JD(NY)–33–11
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

UNITED STEEL WORKERS, LOCAL 4-406

and Case 22-CB-11104

LES PORZIO, An Individual

and Case 22-CB-11214

MANUEL GONCALVES, An Individual

and

ATLAS REFINERY, INC., Party in Interest

Joshua S. Mendelsohn and
Marguerite R. Greenfield, Esqs.,
Newark, New Jersey, for the General Counsel
David Tykulsker, Esq. (David Tykulsker & Associates), Montclair, New Jersey
for the Respondent

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. This case was tried in Newark, New Jersey on March 29, 30 and 31 and April 7 and 8, 2011. The charges and amended charges were filed by Les Porzio and Manuel Goncalves alleging violations of the National Labor Relations Act (the Act) by United Steel Workers Local 4-406 (Respondent or Union). On February 16, 2011, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the complaint) was issued by the Acting General Counsel[1] alleging that Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act by proposing the elimination of the lead operator position then occupied by Porzio and the maintenance 1 position then occupied by Goncalves, thereby attempting to cause and causing a reduction in the wages of Goncalves and Porzio because they crossed Respondent's picket line and returned to work during a lockout of employees and for reasons other than the failure to tender the periodic dues and initiation fees uniformly required as a condition of employment. Respondent filed an answer denying the material allegations of the complaint and posing certain affirmative defenses, as will be discussed below.

[1] For ease of reference, hereafter called the General Counsel.

Based upon the entire record including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following findings of fact, conclusions of law and recommendations.

Findings of Fact

I. Jurisdiction

The complaint alleges, Respondent admits and I conclude that Respondent is a labor organization within the meaning of Section 2(5) of the Act. Atlas Refinery, Inc. (Atlas or the Employer) is a corporation with a facility located in Newark, New Jersey where it is engaged in the manufacture of chemicals. The complaint alleges, and Respondent admits that during the preceding 12 months, in the course and conduct of its business operations, the company sold and shipped from its Newark, New Jersey facility products, goods and materials valued in excess of $50,000 directly to points outside the State of New Jersey. Respondent admits, and I find that Atlas is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

This case arises out of the terms reached in a collective-bargaining agreement between the Union and Atlas in June 2010 (the 2010 agreement), which, among other things, eliminated two positions: lead operator and maintenance 1, held by Porzio and Goncalves, respectively. These employees were then placed into other positions and suffered a consequent reduction in salary which, on a percentage basis, was in excess of reductions suffered by certain other bargaining unit employees. The General Counsel has alleged that the Union's proposal to eliminate these two positions constituted a violation of its duty of fair representation and retaliatory discrimination for these employees' concerted, protected conduct which consisted, among other things, of crossing a picket line during a June 2008 lockout of employees.

The Employer manufactures lubricants and auxiliaries for the leather industry at its facility located in Newark, New Jersey. Steven Schroeder Jr. is the Employer's President and Chief Operating Officer and William Baumann is its Operations Manager. Michael Fisher is the International Representative for the Union, and Cary Krand has served as the Union's President during the times at issue here.

Porzio has worked for the Employer for 24 years, is a member of the Union and currently serves as shop steward for the facility. Previously, he served as first and third vice-president of the local then representing the employees, and also served as shop steward from 1987 to 2007.[2] In this capacity he participated in contract negotiations on five or six occasions. He has held a number of positions at Atlas including head shipping and receiving clerk, head refiner, sulfinator, boiler operator and lead operator. Porzio currently serves as the boiler operator at the facility. Prior to the implementation of the 2010 agreement, as lead operator Porzio earned $28.41 per hour. As the boiler operator, he presently earns $25.33 per hour.

Goncalves has worked for the Employer for over 10 years as a maintenance employee.

[2] It appears from the record that some of these positions were with predecessor unions which represented the Atlas employees at the time.

Sometime during the fall of 2007 he assumed the position of maintenance 1, the head maintenance position at the Atlas facility.[3] After the elimination of this position, he was slotted into a maintenance position. Goncalves' salary decreased from $26.69 to $21.21 per hour. This is the same rate which is currently paid to other employees at the facility who are considered operators.

Also testifying in this proceeding was John Carrasca, who is an operator at the facility.[4]

A. The Underlying Unfair Labor Practice Case

The allegations of the instant case arose from the effects of a lockout at Atlas in June 2008. That lockout, and related unfair labor practices, led to a prior case, *Atlas Refinery, Inc*., 354 NLRB No. 120 (2010), where the Board found that the Employer violated Section 8(a)(1) of the by threatening to discharge employees who would not return to work under the new terms and conditions of employment that the Employer unlawfully implemented and by soliciting employees to withdraw from the Union. The Board further concluded that the Employer violated Section 8(a)(3) and (1) of the Act by discharging certain employees because they supported the Union's efforts to continue bargaining and that Atlas violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as long as former employee and shop steward Jeff Gilliam was part of the bargaining committee; by unilaterally implementing new terms and conditions of employment on June 9, 2008 absent a valid impasse; by locking out employees in order to evade its duty to bargain with the Union and by withdrawing recognition from the Union based upon unlawfully solicited resignation letters. As part of the remedy for the unfair labor practices found, the Board ordered an affirmative bargaining order.

The administrative law judge in the prior case found that Porzio and Carrasca are "employees admittedly biased against the Union." He further found that Porzio, an employee "admittedly interested in 'a position where you had particularly close relations with management'" assisted in collecting letters of resignation from the Union. 354 NLRB slip op. at 13, fn. 43, 45.

As the judge further noted, at the outset of the 2008 negotiations the Union sought, among other things, annual wage increases of 10 %, (with a differential for tier 2 and 3 – less senior – employees). The Union subsequently modified this proposal and sought a 7 % increase in each year of the agreement. After the involvement of the FMCS the Union adjusted its proposal to an across-the-board a wage freeze in the first year and 3% increases in each of the second and third years. The Union then advised the company that it was willing to accept further wage reductions as follows: a 5 % wage cut in year one, keeping wages flat in year two and a 3 % raise in year three. Thus, as outlined in the prior case, the Union's proposals had

---

[3] At the hearing Respondent appeared to suggest that Goncalves did not assume the maintenance 1 position until some time after he crossed the picket line in June 2008, but to the extent any evidence was adduced pointing to this assertion it was unpersuasive. Rather, this suggestion is contradicted by the testimony of various witnesses, including Goncalves, Porzio, Baumann and Schroeder. The record establishes that after head maintenance employee Jason Malinowski went on medical leave in the fall of 2007, Goncalves assumed the maintenance 1 position and was compensated accordingly. When Malinowski returned to work in the spring of 2008 he worked as a boiler operator and did not work in maintenance again. Goncalves retained the maintenance 1 position until its elimination in June 2010.

[4] Carrasca testified that he is the head shipping clerk/lead operator. In an information request submitted to the Union in February 2010, Atlas classified his job title as head operator – shipping. There is no evidence that Carrasca ever occupied the lead operator position held by Porzio during any relevant time.

consistently been across-the-board proposals and, with the exception of certain initial proposals relating to tier 2 and 3 employees, were otherwise not tied to any particular job title.

B. The Creation of the Lead Operator Position in 2008[5]

In late 2007, Porzio, who was then the boiler operator, told Operations Manager Baumann that he had received an offer of employment from the Patterson, New Jersey school district. Baumann then suggested that the company might create a managerial position for Porzio to induce him to stay. The position was tentatively called assistant plant manager.

As Porzio testified, about a week or two after this initial discussion, Baumann told him that he had spoken to Krand, who had suggested keeping Porzio in the bargaining unit by making him a lead man rather than promote him to management.[6] Krand testified that the Employer advised the Union of its desire to create a "working supervisor" position and Krand maintained that the Union did not have supervisory personnel in the bargaining unit. Baumann then proposed that the parties meet to discuss the matter further.

On Monday, January 14, Baumann sent the following e-mail to Krand:

> As per our conversation on the phone the other day, we are looking into the idea of advancing union employees into a supervisory position. During our conversation, you mentioned the use of "lead men" in other facilities, and I would like to see copy of the job description to see how it could fit here at Atlas Refinery.

Porzio testified that he was unhappy with this suggestion, and confronted Krand about it, asking why the Union would seek to prevent him from being promoted to management. Krand sought to placate Porzio by stating that the Union would negotiate a higher wage for his new position. In a subsequent conversation, Krand told Porzio that there were other lead operator positions in bargaining units represented by the Union and he wanted discussions over the creation of such a position to be used as an incentive to initiate collective bargaining for a successor agreement.

On February 5, Baumann, Krand and Fisher met to discuss the creation of the lead operator position. Porzio was not invited to attend. Fisher testified that at the meeting he expressed his opposition to the creation of the new position due to the fact that he perceived it as a management position and called for the elimination of another position, that of utility operator, which might cause employees to bump other employees from their positions. I note that Fisher's account of what occurred at the meeting was not corroborated by Krand, who testified only that a meeting occurred, but offered no details of what was discussed during that time. Bauman, who was called as a witness by the General Counsel, was not asked about what occurred during this meeting either.

Some detail of what occurred in that meeting is contained in an arbitration award issued after the Union filed a grievance over the creation of the lead operator position (discussed in further detail below).[7] Testimony about this meeting was adduced at the arbitration from shop steward Jeff Gilliam, Krand and Baumann. Schroeder also offered some testimony about the parties' discussions.

---

[5] Until further specified, all dates are in 2008.

[6] The General Counsel failed to adduce any testimony from Baumann on this issue.

[7] The arbitration award was introduced into evidence by Respondent.

At the arbitration hearing, Krand testified that the Union never agreed to the creation of the lead operator's position and that the Union wanted to address that issue in upcoming contract negotiations. Krand further testified that he advised Baumann that he was "concerned about a supervisor doing bargaining unit work." As the arbitrator found, however, at the February 5 meeting convened to discuss the creation of this position, Krand showed Baumann contractual language from another bargaining unit which summarized a lead person's position and also made it clear that the Union took the position that the proposed lead operator could not discipline employees. The company agreed with that.

The day following the parties' meeting, described above, Baumann sent the following e-mail to Krand:

> As suggested, I gave the revised "lead operator" proposal to [shop steward] Jeff [Gilliam] to review after you and Mike Fisher left yesterday. Did he mention or send you a copy after we looked at it. We basically change[d] the wording to what you read out of the small hand book. I will attach a copy with this e-mail.

Krand failed to respond to this e-mail and the Employer posted the position on February 19. Porzio bid for and was awarded the position, which carried with it a wage increase of $1 per hour. He assumed his new duties on March 3. As Porzio testified, at some point the Union asked him to withdraw his name, which he refused to do. Krand testified that after Porzio became lead operator, he received telephone calls from three employees, all more senior than Porzio, who complained that Porzio was telling them what to do and how to perform their jobs.[8]

Porzio denied that he ever disciplined or recommended discipline to management and it is undisputed that the Union never filed a grievance over Porzio's performance of supervisory work. At the time it created the lead operator position, the Employer also eliminated utility operator position, which had previously been held by Gilliam, but by the time the lead operator position was created, Gilliam had been on vacation and medical leave for an extended period of time and, in fact, the Union had requested long-term union leave for him. On March 12, Gilliam was terminated for absenteeism.

At some point prior to his promotion, Porzio had filed an unfair labor practice charge against the Union alleging a violation of the duty of fair representation in the failure of the Union to negotiate the lead operator position for him.[9] In an affidavit given in conjunction with the charge, Porzio asserted that he felt that the Union's suggestion that he be given a lead operator position rather than a managerial one was "a great idea." He testified to the contrary at the instant hearing, asserting that he was upset by the suggestion, and felt that the Union was "submarining" him out of a managerial position, and that he advised Krand of his feelings at the time. Krand told Porzio that he wanted use the issue of the creation of the lead operator position to accelerate collective bargaining for a successor agreement.

In response to the creation of the lead operator position, the Union filed an unfair labor practice charge and a grievance.[10] The charge was deferred to arbitration. The arbitrator, in

---

[8] The employees named by Krand were Gilbert Alers, Carlos Alers and Edmondo "Cookie" Maisonet.

[9] The charge was dismissed.

[10] The unfair labor practice charge alleges that the Employer "failed to bargain in good faith by unilaterally changing terms and conditions of employment by creating a lead operator position." The record does not contain a copy of the grievance filed by the Union, but the issue as framed by the

Continued

sum, found that the company did not violate the parties' collective bargaining agreement when it created and filled the lead operator position, but that it was obliged to bargain with the Union over the wage to be paid for that position, with the proviso that the Employer could implement its wage offer on September 4, 2009 if the parties did not reach agreement by that date.

After receiving this award the Union sought to have the Board's regional office revoke its decision to defer the charge, and appealed the Region's decision not to do so. The Union was unsuccessful in seeking to have deferral of the charge revoked. In its post hearing brief, Respondent asserts that the above facts show that "the Union clearly and consistently manifested its opposition to the Employer's creation of a new Lead Operator position."

C. The 2008 Lockout

As has been noted above, during the spring of 2008, Atlas and the Union were engaged in negotiations for a successor to the 2003-2008 collective-bargaining agreement (the 2003 agreement), which had been extended twice to June 6.[11] On that day, the Union rejected the Employer's revised final offer. On June 9, Atlas initiated a lockout but offered employees the option of returning to work under unilaterally implemented terms. See *Atlas Refinery*, supra slip op. at 12 and fn. 41. At this point in time, Atlas had 13 working employees, and two on military leave.

Six employees returned to work on June 9: John Carrasca, Jason Malinowski, Edward Olander, Ruben Quingalahua, Goncalves and Porzio. A seventh employee, Carlos Alers, was on leave, but telephoned management on June 9 and stated that he would return to work the following week, after his vacation concluded. On June 10, an eighth employee, Edmondo "Cookie" Maisonet, also returned to work. The two employees who were on military leave, Danny Rivera and Marco Sanchez, were allowed to return at the conclusion of their tours of duty. Thus, a majority of employees returned to work under the terms of the Employer's final offer.

Upon the employees' return to work, they were informed of their new terms and conditions of employment and were given individual employment agreements to sign. Among other things, the agreements provided for a 10% reduction in their hourly wages in each of two years.[12] As has been described above, employees also signed letters of resignation from the Union and Porzio filed a decertification petition with the NLRB.

On June 10, Atlas terminated the remaining locked out employees: Gilbert Alers, [13] Raymond Ardiente, Bibiano Dechavez, Alexander Nunez and Aybar Braudillo. Alers was recalled to work in early 2009.

D. The Allegations of Picket Line Hostility

On June 10, the Union established a picket line in front of Atlas, joined by the minority of workers who had not returned to work. Although subject to attrition, picketing continued throughout the summer and fall months until Alers was recalled. Alers, who was also the shop

---

arbitrator was whether the Employer violated the parties' collective bargaining agreement when it created and filled the lead operator position and if so, what the appropriate remedy would be for such a violation.

[11] The history of these negotiations is fully set forth in the predecessor case.

[12] The wage reduction in the second year was not implemented by the Employer.

[13] Unless otherwise specified, all further references to Alers are to Gilbert.

steward, had been the final individual remaining on the picket line.[14]

Krand and Fisher were at the picket line intermittently. Krand testified that at the outset of the lockout, he had been in negotiations for another facility and would stop by for an hour or two, two to three times per week until those negotiations concluded in August. Thereafter, he would come by the facility about three times per week. By this point in time, the line was depleting. Fisher testified that he would try to get to the plant three to four days per week. As time went on, people dissipated and only Alers would be present. Fisher did not offer testimony as to how long his visits to the facility lasted on the occasions when he was there.

Baumann testified that the individuals on the picket line engaged in bantering with those inside, and held signs which read "strike" and "lockout." Fisher testified that people were cordial with each other, having worked together for years and that on occasion he would see the employees inside and those outside talking and laughing with one another. Krand testified that he had instructed those on the picket line not to make any comments or vulgar statements toward anyone which would interfere with the case which the Union had brought before the NLRB and not to litter, cause any damage, write graffiti or to otherwise give cause to be removed from the area.

Porzio testified that during the lockout his interactions with Krand were sometimes hostile. He testified to three specific occasions where this is alleged to have been the case. On one occasion, in about July or August 2008, the Union brought an inflatable rat to the work site for several days. As Porzio testified:

> On one particular occasion [Krand] called me to the fence line and they had a big inflatable rat blown up in front of the property. And he goes, Les, you're like a rat. And I go, yes, I guess. And he goes, looks good, doesn't it. I go, yeah, it does. And he goes do you want to know what its name is? And I said yeah. And he goes it's Les. And he had Aybar Braudilio right next to him, another union employee, and they were pointing at the rat, laughing at it, calling it Les.

Baumann also testified that the rat had been referred to as "Les" or "Lester." Krand denied that he referred to the rat as "Les" or by any other name, and stated that he never heard anyone else do so. Fisher also testified that he never heard anyone refer to the rat as "Les." [15]

In about August 2008 the company held a barbeque for those who were working inside. This was apparently the first time they had done so. Porzio was about 20 feet from the fence line, tossing a ball with another employee when Krand came over to the fence and said words to the effect that Porzio should have his fun now because he would not have fun later. He told Porzio that he would see what was going to happen to him. As Krand recounts it, he heard the company broadcast over the public address system that all non-union men should report to the

---

[14] The General Counsel has argued that the Union has conceded that Alers was an agent of Respondent during the period of time he served as shop steward. The record does not support this assertion. At the opening of the hearing, Counsel for the General Counsel moved to amend the complaint to "include Gilbert Alers as a chief shop steward until May 2010." The Union "consent[ed] to the amendment of the complaint" but denied that Alers was in fact a shop steward until May of 2010 based upon its belief that he ceased to be the shop steward on or about March 17 or 19, 2010. There is no specific stipulation, however, as to the agency status of Alers.

[15] Krand further testified that the rat is meant to symbolize the employer with which a union has a dispute. On cross-examination he acknowledged that the rat is also used to protest the use of non-union labor.

back for a picnic barbeque. He, together with Gilliam, walked around to the back to see what was going on. Porzio was about 10-15 feet from the fence line playing catch with one of the Schroeder brothers. As Krand testified, Porzio initiated their interaction, calling out that they never got treated like this when they were in the Union. Krand replied that Porzio should enjoy it while it lasts. Krand denied making any threat to Porzio. According to Baumann, who stated that he overheard the exchange, Krand called out "enjoy it now" and "don't worry, you'll get yours." Baumann confirmed Krand's version of events insofar as he stated that Krand and Porzio had been talking to each other prior to that and Krand's comments were in response to other things which had been said.

Porzio further testified that sometime in August 2009, he spoke with Krand near the shipping warehouse. Krand told Porzio that he was making this really hard on his union brothers who were out there. Porzio replied that they had a choice, they could have worked or not. Krand then became a "little agitated." Porzio reiterated that he had to make his decision and that he was sorry. As Porzio testified, Krand replied that Porzio should have been out there with his brothers, and he was going to see what happens when the union gets its foot back in the door.

Porzio testified that Krand spoke with him on "at least a dozen" other occasions and that Alers would regularly yell "scab" or "traitor" at him from the other side of the fence. On one particular occasion, Alers, who was alone at the time, called Porzio over to the fence and told him that the employees had to come out and help him; that he was the last one out there, that he was losing his house, he was almost declaring bankruptcy and his wife was sick. Porzio told him to come inside and work. Alers replied that if Porzio wasn't going to come outside he didn't want to talk to him and that Porzio would see what would happen to him.

Goncalves testified that as a maintenance employee he works both inside and outside at the facility and when Krand and Alers would see him they would "chase" him and call him "scab." Goncalves testified that Krand would say, "Thank you, Manny, you will see what will happen." Alers would laugh and make similar comments.

Krand generally denied hearing epithets or vulgar or threatening comments or that he personally threatened anyone while on the picket line. Fisher denied ever hearing Alers make threats or use the term "scab." He further denied hearing Krand make a threat or hearing him state words to the effect of "you will see what happens" or "we will get you."[16] Fisher also denied hearing anyone referred to as a scab and testified that that there had been signs posted on company property disparaging Alers and Krand.

E. Post-Lockout Communications with Krand

After the Board issued its decision and the parties were about to commence bargaining, Porzio sent Krand a series of e-mails requesting updates about contract negotiations. On Friday, March 12, 2010[17] he sent the following:

> I've been trying to reach you. I called you twice already today. What is up with the extra 300 bucks in our paychecks today. Did you speak with Gilbert? He quit the shop steward position. Now we have to call an election for a new shop steward and committee. We have no plant representation at all. And did you guys get any dates to negotiate yet?

[16] Although Krand offered a general denial as to threats, he did not specifically deny that he used words to the effect of "you will see what happens" or "don't worry, you'll get yours."

[17] All dates hereafter are in 2010 unless otherwise indicated.

> Gilbert told me he has been trying to reach you all week. Is there something going on or what? Did the NLRB do something to make you guys go back to the table? The men in the plant and myself would like an update on what's going down. You [are] always quick to call us when you won something, now we aren't hearing shit! Call or write me back so I can tell the guys what'[s] up.

On Wednesday, March 17, Porzio wrote the following:

> Cary sorry I missed the meeting today had a personal matter to deal with. John told me that we are not having an election because we don't need one. I'm a little confused, we have no shop steward and no committee in the plant, who is representing us? The contract clearly states 3 plant representatives and we have none. Gilbert quit. I don't understand why guys who don't work in the plant are representing us? Some of these men haven't seen the inside of Atlas for 2 years, how do they know what we want or need if they aren't working? Can you please give me an answer. I hate to go down to the NLRB and file charges against the Union again for misrepresentation or is the NLRB in some kind of conspiracy with you and Mike? Because Gilbert said Jeff Gilliam was on the negotiating team, and none of us asked him or you to have him on the team! Jeff Gilliam was fired what the hell are you trying to pull here!!!!!!! I was also told by Gilbert, that you don't want me on the committee. It's not up to you, on who represents us, it's the membership!!! You know the people who got you elected!!!!! So please tell me what is really going on with the Union. You may not like me and that's okay, but keep this in mind, I was shop steward for over 15 years and serve[d] on the committee for over 20 years and negotiated over 6 contracts, 5 of them good, 1 bad and that was the strike year which we never recovered from, so try to work with me and your men in the plant.

On March 19, Porzio sent the following letter, signed by five coworkers, to Krand:

> The plant workers at Atlas Refinery Inc. would like to know in writing why we haven't had an election for a new committee? Our chief steward resigned and we have no representation in the plant. Also the other committee men are on lay off and haven't worked in the plant for 2 years! We need to address this problem as soon as possible! Also it has come to our attention that a terminated employee is on the negotiating team! Not one plant employee has requested the services of said terminated employee (Jeff Gilliam) to negotiate for us. What are you guys trying to pull on us! We the plant workers simply can't believe that your team of negotiators would have our best interest at heart! All the men that are on the negotiating team are clearly disgruntled employees! (One terminated and two laid off for 2 years) and one that doesn't want to be on the negotiating team. The contract clearly states on page 19 article 11 that the Union committee shall consist of 3 plant representatives and one alternate. None of the men now on the negotiating team fit that qualification, except Gilbert and he doesn't want to be involved with negotiations anyway! We would like a written response A.S.A.P! or by 3/25/10.

Then, On March 23 Porzio sent the following e-mail to Krand:

> Gilbert told me he handed you and Mike the letter from me and the men in the plant. Just waiting on your response. Also the men in the plant and myself can't believe that Ray was sleeping in your meeting on [F]riday!!!!! What a disgrace, do you and Mike have any pride.

Krand testified that about one to two weeks after the Board decision issued on January

15 he held a meeting with employees to explain the decision and get employee contact information. Both Porzio and Goncalves attended this meeting. Porzio in particular wanted to know how employees would receive their backpay and the Union attorney, who was present, explained the process. There was no discussion of negotiations at this time.

Following this meeting, Krand held a discussion with Alers about the negotiating committee for the new contract. As Krand testified, he asked Alers to see if anyone inside the plant was interested in negotiations and Alers notified him that he had asked around and nobody was interested. Subsequently, Krand met with employees to solicit contract proposals but neither Porzio nor Goncalves attended. Alers notified the Union that he no longer wished to be shop steward and Krand asked him to stay on for a short while to assist in negotiations, which he did. On April 23, Alers submitted his written resignation, and did not serve as shop steward after that time.

Regarding Porzio's request for information about negotiations, Krand asserts that he told Porzio that he was not going to sit on the phone and give him a "blow by blow" on a daily basis. He advised Porzio that when negotiations were completed, the Union would sum it up and report to employees. In his testimony, Krand did not specifically address the complaints made by Porzio that current employees were not represented on the negotiating committee.

F. Job Classifications and Employee Status at the Employer's Facility

The 2003 agreement contained the following job classifications: operator, assistant operator, helper, maintenance 1, maintenance 2 and boiler operator. Employees hired prior to the effective date of this agreement were considered tier 1 employees, and those hired subsequent to its implementation were placed into tier 2, which resulted in a reduction in the rate of their compensation; however, the job classifications remained the same. The 2003 agreement also provided for a $.50 per hour wage supplement for any two employees who obtained a "black seal" boiler operator's license.[18]

During the term of the 2003 agreement, two new job classifications were created. One was utility operator, which was created in November 2007 and eliminated in February 2008, and the lead operator position, which, as discussed above, was created in February 2008 and was done away with in the 2010 agreement.

In February 2010, in response to the Union's request for information in anticipation of bargaining, the Employer provided the following list of employees and their respective job titles:

Lead Operator	Les Porzio
Head Maintenance	Manny Goncalves
Head Operator-Chemical	Carlos Alers
Head Operator-Pumper	Gilbert Alers
Head Operator-Shipping	John Carrasca
Head Operator-Sulpho	Ruben Quingalahua
Head Operator-Textile	Edmondo Maisonet

Thus, at the time negotiations for the 2010 agreement commenced, of the seven bargaining unit employees working at Atlas all with the sole exception of Gilbert Alers had

[18] A black seal license indicates advanced training and proficiency in the operation of a boiler.

crossed the picket line. Only one employee, Quingalahua, was a tier 2 employee.

Apart from Porzio and Goncalves, all other employees were being compensated at the operator rate. Carrasca and Quingalahua were each paid an additional $.50 per hour as a function of their black seal boiler operator license.

G. The 2010 Negotiations

The parties met for negotiations between the dates of March 16 and June 1. Although there was some variation in attendance, the Employer generally was represented by Baumann, Schroeder and attorney Tom Ryan. The Union was represented by Krand, Fisher, former employee Ray Ardiente and attorney David Tykulsker. Alers attended the meetings which took place prior to his resignation as shop steward. It is undisputed that throughout negotiations the Employer sought significant financial concessions and allowed the Union to inspect financial records to substantiate their claim of financial hardship.

The following summary of what was discussed at these negotiations was culled from the exhibits introduced into evidence at the hearing, the testimony of Baumann, Fisher, Krand and Schroeder and the bargaining notes that were offered into evidence by the parties. General Counsel did not adduce detailed evidence relating to the parties' early discussions, apparently due to its stated theory that the Union's discriminatory intent did not manifest itself until the negotiation session which was held on May 14. Respondent, to the contrary, maintained that the parties' discussions and exchange of proposals at these earlier meetings are relevant to its contention that there was no discriminatory intent on the part of the Union in the negotiations on whole.

At the initial meeting, on March 16, Atlas submitted a proposal which largely reiterated the final offer which had been presented to the Union on June 6, 2008. The company sought a five-year agreement. With regard to wages, the Employer had proposed reducing all tier 1 rates by 10% in years one and two, keeping wages flat in year three and increasing wages by 3% in each of years four and five. As for tier 2, the proposal was to reduce all rates by 15% in year one, 5% in year 2, keeping wages flat in year three and an increase of 3% in each of years four and five. The Employer also made proposals regarding recall, holidays, employee contributions to their health care plan, pension, Union committee and Union leave.

On April 1, the Union presented its initial proposals. They were seeking a prospective term of three years with wages to be increased by 4% for all employees for each year of the agreement. The Union additionally proposed that the job descriptions on file would become effective on the effective date of the contract. It appears that in response to a discussion of the company's financial condition, the Union then modified its initial proposal to no change in year one and 3% increases in each of years two and three of the contract. The Union agreed to suspend four holidays for years one and two of the agreement with a "snap back" provision in year three. The Union further proposed that there be no change in the vacation allowance or the rate of health care contributions and that there would be a pension rate contribution increase to $1.69 per hour for all employees.

On April 5, Schroeder made a presentation to the Union reiterating that the company's financial position had "deteriorated dramatically," citing layoffs, wage cuts and benefit reductions for all non-union employees. At that time, the average pay rate under the 2003 agreement was $23.84 per hour. This proposal references the Union's new economic proposals as presented on April 1 and states that under that proposal the average pay for unit employees would be $25.87 per hour.

In this presentation, the company proposed a five-year contract retroactive to April 9, 2008 and wage reductions of 10% and 6% in years one and two respectively, keeping wages flat in years three and an increase of 3% in years four and five. Tier 2 employees would suffer wage reductions of 15% in year one and 6% in year two, with no change in year three, and increases of 3% in years four and five. The employer additionally proposed that Quingalahua's rate changes would follow tier 1. The Employer further proposed eliminating the assistant operator position in both tier 1 and tier 2. In total, the company's proposal sought to reduce costs by 8% in the fifth year through reductions in pay rates and benefits. The average pay rate under the contract would be $21.45 per hour.

On April 6, the Union responded to the company's presentation by modifying its proposal to keep wages flat in each year of the agreement. The Union agreed to suspend certain holidays for part of the term of the agreement. There was at this time a tentative agreement on the amount of the Employer's contribution to the pension fund.

On April 20, the Employer modified its wage proposal seeking, for tier 1 employees, wage reductions of 10% in year one, 3% in year two, no change in years three and four and a 3% wage increase in year 5. As regards tier 2, the Employer sought a reduction of 15% in year 1, 3% in year two, no change in years three and four and a 3% increase in year five. There were also discussions regarding the computation of vacation, sick and disability leave and the Employer's proposal that the contract be retroactive to 2008.

On May 5, the Employer provided the Union with supplemental financial information documenting three consecutive years of annual losses, asserting that its business had not recorded a profit for four of the last five years, and outlining the elimination of positions and reduction of wages and benefits for non-union employees, cutbacks in general expenses and investments, as well as an increase in debt to creditors. The Employer also argued that during this period bargaining unit employees had no "financial participation in the restructuring of Atlas." During this meeting, the parties agreed on a vacation leave policy which generally followed management's proposal with the proviso that certain events be counted toward hours of work.

At the next session, on May 14 the Union proposed a 3% decrease for the bargaining unit in year one and two, with wages remaining flat in year three for employees generally, but a 5% reduction in the wages to be paid to the lead operator, maintenance 1 and the boiler operator (then vacant). The Union further proposed to remove the $.50 wage supplement for boiler licenses. Fisher testified that the Union proposed a greater reduction for the three classifications because the Union was trying to address management's request for economic concessions, and that these were the top paid positions and therefore could take a "greater hit."

On May 25, the parties met again. At this time the Employer proposed the elimination of the assistant boiler operator position, which at the time was unfilled. The Union proposed a 10% wage cut for the lead operator, boiler operator and maintenance 1 positions in the first year.[19] For all other employees the Union's proposal was a wage reduction of 3% in year one, keeping wages flat in year two and increasing wages by 3% in year three.[20] The Employer responded by

[19] According to Fisher's bargaining notes, the wage rates would have been, respectively, $25.56, $24.67 and $24.00 for these three positions.

[20] Baumann testified that the Union offered this proposal in the absence of any counteroffer from its May 14 proposal. The Union has not disputed this.

proposing, for tier 1, reductions of 10% and 3% in years one and two, keeping wages flat in years three and four and an increase of 3% in year five. With regard to tier 2, the proposal differed only insofar as the proposed reduction for year one was 12.5%

The parties met for a final session on June 1. As Baumann testified, Krand slid a paper across the table and stated, "Well, I think the company's going to like this." Bauman looked at the proposal and, according to his testimony, was "shocked." The proposal was for a five-year agreement which incorporated the wage rates paid to employees as of March 2003. As a general matter, the proposal amounted to a 7.6 % wage reduction in the first year, wages remaining flat in the second year, a 2% increase in year three and a 3% increase in the fourth and fifth years. For tier two, there were wage reductions of 9.6% in year one, wages were kept flat in years two and three and increased by 3.7% in years four and five. In addition the classifications of maintenance 1 and maintenance 2 were eliminated and a new position, called "maintenance" was established which was to be paid at the prior maintenance 2 rate; the lead operator position was eliminated and the $.50 boiler license supplement was eliminated as well. The company asked for a caucus and then made a counteroffer basically accepting the Union's wage proposal with one change: that wages would remain flat in year three. The company also asked to remove the assistant operator position, which was then vacant. The Union accepted this proposal and the parties reached an agreement. While the net result was an approximate reduction in pay of 7.6% for the operators in the first year, Carrasca and Quingalahua suffered increased reductions due to the elimination of their black seal boiler operator license supplement.[21] Porzio, paid at the boiler operator rate saw his wages reduced by 11.8%. Goncalves suffered the largest wage decrease, of approximately 21.5%.[22] In dollar amounts, Porzio's hourly wages decreased by $3.08 while Goncalves had a reduction of $5.48 per hour. Alers, Olander, Maisonet, Carrasca and Quingalahua were all paid at the Tier 1 operator rate of $21.21, as was Goncalves. These changes were implemented after the agreement was executed in June 2010.

Fisher offered no testimony specifically addressing how or why the Union came up with its June 1 proposal. Krand offered the following account of how the Union arrived at the figures it presented to the Employer on that day:

> Q: What is the hourly wage for the maintenance position that the Union proposed on June 1st?
>
> A: Twenty one-twenty one [$21.21]
>
> Q: Okay. Why did the Union use the maintenance 2 rates in 2003 when it used it – made its proposal on June 1st 2010?
>
> A: It was the second of concessions that was requested by management, and it was going back to a – and if I'm not mistaken, there's a percent formula that was developed to develop that number
>
> Q: Okay, and would you look at the boiler operator rates on General Counsel's 3? . . The 2003, 2008 contract.

[21] According to the General Counsel, Carrasca and Quingalahua suffered wage reductions of 10% and 12.5%, respectively. Quingalahua, as a tier 2 employee, saw his wages decreased from $19.45 to $17.21 per hour.

[22] Respondent has not disputed these calculations.

A: Okay, the boiler operators. . . Tier 1, I'm sorry, it was $25.33.

Q: Okay, and what was the rate that the Union proposed for the boiler operator on June 1st?

A: Twenty-five-thirty-three [$25.33]

Q: And, why did Union make that proposal

A: Again, it was seeking to address management concessions, and with the percentage being addressed to accommodate what had previously been provided for in the contract.

Q: Okay. It's been alleged in this complaint that the Union took the positions it did because Mr. Porzio and Mr. Goncalves crossed the line in 2008, is that true?

A: No.

Q: Can you explain why not?

A: Well, first of all you've got to realize that the majority of the members crossed the line. The Union [was] adamant in trying to find provisions for all of the employees. The ones that were locked out, the ones that had went [in], it was not anyone singled out, as far as any kind of adverse [effect].

Baumann testified that when the Employer raised the issue of the deletion of the lead operator and maintenance 1 positions, Krand responded that with a smaller workforce, the Employer no longer needed these positions. Krand also responded that these were more highly paid positions and therefore could take more of a hit. Krand, however, failed to offer any testimony to such effect at the hearing.

In a letter written to the Board's Regional Office after the instant charges were filed, Krand made the following assertions:

> The union represented all members properly and fairly in respect to negotiation and the elimination of certain positions within the Atlas refinery facility. In fact, in order to keep the facility viable, the company and the union negotiated the elimination of several positions and they are: the lead operator position, all of the assistant operator positions in tier 1 and tier 2, the maintenance 1 position from tier 1 and the maintenance [2] position from tier 2.

H. Alleged Post-Implementation Statements by Krand

Goncalves testified that he had heard either days or weeks prior to the implementation of the 2010 agreement that he would be the most hurt within the company. When he opened his check, he did not want to believe it. He went to the shop and searched for Krand's telephone number. According to Goncalves, he called Krand on Friday June 11 but Krand did not answer. He then called again and left a message. As Goncalves testified, Krand returned his call the following Monday and asked him what was going on. Goncalves asked Krand if he was not ashamed of what he did to him, that he put him down and it seemed to him like discrimination. Goncalves testified that Krand told him, "Manny, you didn't cross the line, I wouldn't have done that." Goncalves then testified "I kept asking him. I wanted to hear something. There had to be a

solution. I could not believe it." When asked if Krand responded, Goncalves testified that Krand stated, "If you had not crossed the line, if you had stayed outside, I wouldn't have done that to you."

When questioned by Counsel for the General Counsel, Goncalves testified that he made two or three calls to Krand; however on cross-examination Goncalves stated that he had four or five such conversations and that each one was the same: he would demand to know why his wages had been cut and Krand would respond that it was because he had crossed the line. Goncalves testified that Krand had a "smile" in his voice as he made such comments. Goncalves asked Krand if he could put him in a better position to get a little more money and Krand refused. As Goncalves testified, when he spoke with Krand, "it was always the same story."

I must note that at various points during his testimony and cross-examination, Goncalves exhibited moments of confusion, lack of precise memory, and irritability. When asked by counsel for Respondent about his wage rate in March 2008, he replied that he would not answer that question (although he then did do so). I attribute this initial response to a lack of clear memory on that issue. He exhibited confusion about what occurred on the date of the lockout as well as at other times, including the circumstances surrounding his resignation from the Union. He displayed some difficulty understanding certain questions.[23] At a certain point, Goncalves apparently became irritated with his cross-examination, and announced he was growing tired of it and thereafter complained about its length. Overall, Goncalves' demeanor demonstrated that he would quickly become frustrated, in particular, if he could not accurately recall and describe events he was asked about. His response was then to offer a quick, generalized reply rather than address the specifics of the question posed to him.

Krand denied that he received any telephone calls from Goncalves on Friday June 11, and stated that the first call he received was on Monday, June 14 when Goncalves left a message. As Krand testified, he spoke with Goncalves on two occasions on that day. In the first conversation, on Monday, Krand asked Goncalves what he could do for him, because he had no idea of why Goncalves was calling. Goncalves asked what happened to the wages, and Krand asked him what he was referencing. Goncalves stated that he took a pay cut, that it was too much, he was not happy about it and asked what the Union was going to do about it. Krand replied that it was a negotiated wage. Goncalves stated it was cut too much and Krand stated that he didn't cut it, it was negotiated it, those were the rates that were out there and that everyone had taken a pay cut. According to Krand, Goncalves got very frustrated, complained the Union does not do anything for him and hung up the phone.

The next conversation about which Krand offered testimony took place on Wednesday of the same week (June 16). As Krand testified, it was similar to the prior conversation. Goncalves yelled that he could not afford a pay cut, asked what the Union was going to do about it and demanded that it be fixed. Krand replied that there was no way to fix it because it had been negotiated.

In support of Krand's testimony, Respondent produced his cellular telephone log for the month of June. In all there are five calls which Krand testified were from Goncalves: four on

[23] Goncalves' primary language is Portuguese and he testified with the assistance of an interpreter. I have taken this into account. I note, however, that the interpreter was extremely diligent about the accuracy of questions and answers and made every effort to keep Goncalves informed as to what was said by counsel and by me during his cross-examination.

Monday June 14 [24] and one on the following Wednesday. In rebuttal, Counsel for the General Counsel produced Goncalves' phone records which were stipulated into the record. These records show four calls to Krand's telephone number on Friday, June 11 occurring at 10:38, 11:34, 11:48 and 11:49 a.m. Krand's phone records for that day show a call to his voicemail on 11:48 a.m. that day. When shown these records Krand maintained that he did not recall any telephone calls or messages from Goncalves on Friday, June 11 and the only calls between the two were the ones he had highlighted on his phone log for the dates June 14 and June 16.

In attacking Goncalves' credibility on this issue, Respondent points to the inconsistencies in the number of phone exchanges reported by Goncalves in his direct and cross examinations, argues that Krand denied that his conversations with Goncalves took place with the frequency which Goncalves claimed and notes that Krand's telephone records, as explained at the hearing, indicate that the two did not speak on June 11. Nevertheless, I note that Krand was not questioned and offered no specific testimony to rebut Goncalves' insistence that Krand repeatedly told him, in effect, that he would not have cut his wages so drastically had Goncalves not crossed the picket line.

Porzio testified that when he realized that his wages had been cut by over $3 per hour he called Baumann and asked him what had happened. Baumann replied that Porzio should ask his union. He called Krand, who returned his phone call and said that the company proposed the cuts and deleted the lead operator position and that Porzio wasn't the only one who had suffered cuts. Krand testified that on June 15 he had a telephone conversation with Porzio who wanted to know what had been negotiated. Krand gave him a brief summary and Porzio wanted to know who had suggested the removal of the positions. Krand responded that the company had originally suggested the removal but it was of the assistant operator position. Porzio stated that he didn't care about that, he wanted to know who had proposed the removal of the lead operator position. As Krand testified, he stated "we did." Porzio was upset and stated that this was the worst agreement ever negotiated.

I. The June 28th Meeting With Employees

On June 28th Krand and Fisher held a meeting with employees in the locker room at the Atlas facility to discuss the new collective bargaining agreement. All the unit members, with the sole exception of Alers, attended the meeting. Testimony regarding what occurred at this meeting was adduced by General Counsel from Porzio and Carrasca. The General Counsel failed to ask Goncalves about the meeting, although he testified on cross-examination that he was there for part of the time, but left in anger, as discussed below.[25] In addition, both Krand and Fisher offered testimony about the events of the meeting. Further, Porzio had written some notes prior to, during and immediately subsequent to this meeting, which were entered into evidence by the Respondent.

Because what was stated at this meeting is germane to the General Counsel's

[24] As Krand testified, the log reflects both incoming and outgoing calls. Incoming calls will be identified by the word "incoming" or the location the call originates from; if Krand is on the phone the designation "call waiting" will appear. The log also reflects calls to Krand's voicemail. Based upon the phone logs and Krand's testimony, it appears that the first call, which lasted two minutes, consisted of a message left by Goncalves. The second call went to call waiting. The third and fourth calls, which lasted three and six minutes respectively, were incoming calls from Goncalves telephone number.

[25] Counsel for Respondent was allowed to question Goncalves about this meeting over objection from Counsel for the General Counsel.

allegations of unlawful motive, and the accounts of the witnesses vary and are a basis on which I have assessed their credibility generally, I have set forth the individual witness testimony on this issue.

1. Porzio

As Porzio testified, Fisher handed out a copy of the memorandum of agreement which formed the basis for the 2010 agreement. Certain provisions were missing in the circulated draft; in particular those relating to wage rates and the deletion of positions. Porzio testified that Alers had previously informed employees about the job deletions; however based upon his prior conversation with Krand, Porzio believed this had been management's idea. As Porzio testified, Carrasca asked a number of questions including why certain positions had been deleted from the contract, specifically referencing lead operator, assistant operator and maintenance 1. Krand replied that the Union had deleted the positions. Porzio pointed out that Krand had previously told him that it had been the company's idea. Krand replied that Porzio was putting words in his mouth. Porzio stated that "we started going at it" and Fisher said they should move on.

Porzio testified that once Goncalves heard about his job position being deleted by the Union, he stormed out of the room.

At some point, Krand informed the employees present that they were all $1,000 in arrears for their union dues, but Fisher urged him not to discuss the issue at that point.

Porzio then testified that at toward the end of the meeting, Krand read aloud the unfair labor charges that Porzio had filed with the NLRB[26] and stated to everyone in the room that, "if you didn't cross the line, maybe all this wouldn't have happened." When asked if Krand had defended his position, Porzio testified that Krand stated that he had done it for the betterment of the men. On cross-examination, Porzio acknowledged that, in response to his complaints about the contract, Krand replied that "if the union had all stuck together, you would have done better."

2. Carrasca

As Carrasca testified, at the June 28 meeting Krand went over the contract and stated that the company wanted some concessions and to eliminate some jobs. The Union discussed what they had to give back to make the contract happen. After Krand finished speaking, he asked if there were any questions. Carrasca asked who had made the proposals to eliminate jobs and reduce the wage rates. Krand replied that he had made these proposals. Carrasca asked him what gave him the right to make such proposals and Krand replied that he was doing it for the better half of the Union employees that were across the street; the ones that were outside. As Carrasca testified, Krand stated that he was not representing the employees that were in the plant and had crossed the line.

On cross-examination, Carrasca acknowledged that the meeting had been held some time back and he did not exactly recall anything else that was said at the meeting. He

[26] On June 4, Porzio filed the initial charge in Case No. 22-CB-11104 alleging that the Union violated Section 8(b)(1)(A) of the Act by: refusing to hold an election for a new shop steward; not being forthcoming with information on negotiations; refusing to assign negotiators from the plant and refusing correspondence from employees. On July 19, the charge was amended to include the allegations at issue in this case.

additionally pointed out that under the 2010 agreement his $.50 boiler license supplement had been taken away from him.

3. Goncalves

As noted above, Counsel for the General Counsel did not seek to adduce testimony from Goncalves regarding his attendance at this meeting, although he did adduce such testimony from Porzio. On cross-examination, Goncalves testified that the June 28 meeting was something that "he won't forget." When Krand acknowledged that the Union had made the decision to cut the positions and the wages of the employees in those positions, Goncalves approached him and asked him if he was ashamed and asked why he had been put so low. Goncalves then left the room. After offering this testimony, Goncalves stated to counsel for Respondent, "and don't ask me anything else about that."

4. Fisher

Fisher stated that he handed out copies of the labor agreement, although he was not clear if they were complete copies or just a summary of its terms. Carrasca asked Krand who he represented, and Krand replied that he represented all the members. When asked if there was any further discussion about who the Union represented Fisher acknowledged that, "There may have been –well, there were discussions as to the employees inside versus outside." When asked by counsel for Respondent to elaborate on these discussions, Fisher changed the topic and alluded to a discussion regarding representation of both tier 1 and tier 2 employees and comments made by Porzio regarding tier 2 employees.[27]

Fisher was asked whether Krand made any comments to the effect that the Union represented only those who supported the lockout and he stated that Krand had not. He further denied that there was any indication that the Union represented only those who had not crossed the picket line. Fisher testified that Porzio and Carrasca may have made comments to such effect, but that Krand confirmed that he was representing all the members.

5. Krand

According to Krand, as Fisher was explaining the 2010 agreement, members started to ask questions, but Fisher asked them to hold off until he was finished. Carrasca wanted to know who the Union was negotiating for and Krand replied that they were negotiating for everyone. Carrasca asked what Krand meant by everybody and Krand replied that the Union was representing everybody: inside, outside, tier 1 and tier 2. At this point Porzio interjected and made a comment which is reported in the record as "bump the tier 2." That comment agitated tier 2 employee Danny Rivera[28] and Porzio stated that he was not referring to him, but to others.

As Krand testified, Carrasca asked something along the lines of what gave the Union the right to represent the employees in negotiations. Krand replied that the Union had asked whether anyone had wanted to participate in negotiations, and no one had. Krand told Carrasca that he knew that the offer had been made to him, and Carrasca acknowledged that it had.

[27] According to Fisher, Porzio stated, "screw tier 2."

[28] It does not appear from the record that Rivera was employed by Atlas at the time. There is no explanation of why he might have been invited to this meeting and there is no other evidence in the record that he, in fact, did attend.

Then, according to Krand, the discussion shifted from contract to dues issues. Porzio and Carrasca asked why they were paying so much in dues and Krand responded that he had implemented the Steelworkers dues structure.

As Krand testified, the meeting then came to a close. Krand was asked whether anyone raised the issue of wages at the meeting, and he replied that they did not. He denied that anything was said at the meeting about workers about crossing the picket line or employees returning to work during the lockout.

6. Porzio's notes of the June 28 meeting

As noted above, Porzio took notes before, during and immediately subsequent to this meeting. They are not reproduced in their entirety here. Rather, I have excerpted the portions of particular relevance to the instant case.

In advance of the meeting, Porzio prepared five questions as follows:

> Who is shop steward?
> Who is on the committee?
> Who represents the Union in the plant?
> Who proposed the jobs to be cut out of the contract, ass't operator, lead operator, maintenance 1?
> Why aren't we cut equally across the board?

Porzio then wrote answers to these five questions which are, respectively:

> Cary said he was
> Cary said he and no one else
> No one
> Cary said he did it for the betterment of the men. I call Cary a liar and said you told me the company did.
> Cary said the cuts were equal. MORE BULLSHIT. Cary is pissed off saying I'm putting words in his mouth.

Porzio also took notes during the meeting, as follows:

> Cary said the local will serve as shop steward and union in the plant! I never heard of such a thing.
> Cary said we were $1,000 in arrears
> Mike told Cary not to discuss arrears and move along with the changes in the contract I say this is the first time I'm hearing this! Dues.
> Cary said the lead operator was a management issue! Telling people what to do. His idea stupid ass.
> Cary is pissed that me and John are asking questions about all the changes in the contract! Then Cary reads my NLRB charge against the Union in front of all the men! What a dick!
> Mike is shaking his head at Cary for reading the charges. I believe Mike thinks he is stupid!

Porzio's notes then indicate that a brief lunch break was taken, after which the meeting resumed and the contract terms were discussed. According to Porzio's notes, the discussion was as follows:

Contract 5 years June 1, 2015. Insurance, eyeglasses $100.00
Reduced recall rights to 180 days for new employees, current 365
Holidays reduced to 9 from 12, snap back at end of contract
WTF does that mean, more bullshit. Columbus Day, Personal Day, Veteran's Day, Wow.

Porzio's notes then outline the vacation provisions of the contract, with certain editorial comments indicating that he is unsatisfied with these terms. There are also notations relating to sick days, signing bonus and personal days

His notes then continue:

Assistant operators?	Gone
Maintenance 1 and 2?	Gone
Lead Operator?	Gone
$.50 hr. two employees other than the boiler operator?	Gone

Dues increased to every week. 1.3% more good news. The worst negotiations ever! Are you guys proud of yourself! 19 guys to 8 and you make all these cuts in the contract. HORRIBLE.
John says half the changes in the contract weren't in our proposals
Cary states: ask your committee
I said this is bullshit, this was the worst negotiations ever!
Cary blames us for crossing the lockout line. I say he is full of shit again and he is a liar and stupid. Mike calms us down. John is going at it with Cary now.
I say to Cary that I can't believe how bad this contract is we got nothing!!!
Cary states: We should have stayed with our Union Brothers outside.
I tell him that they are all out of work now because of him. Cary says they will all be back. More bullshit!

Meeting ends with everyone pissed off about contract and no committee. I want to speak to Mike but Cary won't let him.

III. Analysis and Conclusions

A. Contentions of the Parties

The General Counsel has contended that Porzio and Goncalves were targeted for inordinate reductions in their negotiated contractual wages through the elimination of their positions because of their protected conduct. At the outset of the hearing, the General Counsel contended as follows:

> . . . The Union had been negotiating with the company on and off for almost two years. And when the parties returned to the table in 2010, the Union requested increases in wages for everyone.
>
> They may not have come to the table with proposals to sink [Goncalves] and [Porzio], but when they got close to a deal, after years of negotiating, labor unrest and the realization that concessions would have to be made, they sacrificed [Goncalves] and [Porzio] because, they could, because they crossed the line, because no Union supporters shared their job titles.

> All employees took a pay cut, but both Porzio and Goncalves suffered cuts far greater, not only than every other Atlas employee, but greater than what the Employer sought at the start of negotiations.
>
> We cannot know what the Union's motives or intentions in making their various proposals. But the evidence that the Union's previous animus toward the charging parties, its escalating, discriminatory offers culminating in the elimination of their positions and Krand's subsequent justifications demonstrate the Union's discriminatory intent . . ..

In a similar vein, in response to Respondent's second of two motions to dismiss the complaint made at the hearing (discussed further below), Counsel for the General Counsel asserted:

> . . .there's evidence before you that these employees engaged in protected activity challenging the interests of the Union. That there is evidence that the repeated statements of [hostility] to these employees, both while they crossed the line, threats of consequences because they crossed the line, and a statement of admission that the objected to contractual changes were because they crossed the line.

Thus, during the course of the hearing, the General Counsel repeatedly tied its theory of the violation in this matter to the fact that the two named discriminatees crossed the picket line in June 2008.

In his post hearing brief the General Counsel additionally contends that the Union sought an increased reduction in the wages and benefits for two other employees who crossed the picket line, Carrasca and Quingalahua, all in an apparent effort to mitigate the impact on and to protect the eventual wage rate of its supporter, former shop steward Gilbert Alers. General Counsel points to no transcript references to support its apparent contention that this alternate theory was litigated.[29] Reviewing the record, I find that it was not. There is no basis for me to conclude that Respondent was put on notice of this theory and General Counsel has offered no evidence to suggest that Respondent was aware that this additional contention would be raised in this proceeding. Although a judge may in appropriate circumstances find a violation not specifically alleged in a complaint, the Board considers the scope of the complaint and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and that which had been asserted during the hearing. See generally *Sierra Bullets, LLC*, 340 NLRB242, 242–243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory). Here, I find that the issue of the Union's alleged discrimination against other bargaining unit employees in an effort to protect its supporter Alers was neither raised nor litigated during the course of the hearing.[30]

In support of its contentions generally, the General Counsel points to statements of

---

[29] It does not appear that charges were filed with regard to these two employees. The complaint in this matter alleges that the Respondent engaged in unfair labor practices "because Les Porzio and Manuel Goncalves crossed Respondent's picket line and returned to work during a lockout and for reasons other than the failure to tender the periodic dues and the initiation fees uniformly required for membership in Respondent."

[30] As discussed below, this determination has some impact on my recommendation as to the appropriate remedy for the violations found.

animus allegedly made to Porzio and Goncalves by Union officers and alleged agents, both during the lockout and thereafter; the Union's departure from its usual practice of seeking across-the-board wage proposals; its apparent decision to bargain against itself during May 2010 without having received a counteroffer from the Employer; and the Union's alleged failure to present evidence of a lawful motive for its actions.

On two occasions during the hearing, Respondent moved for the dismissal of the complaint.[31] The Respondent notes that, with the exception of Alers, all of the employees working for the Employer in June 2010 had crossed the picket line. Respondent argues that, given that the contract advantaged a majority of those employees who crossed the pocket line, it cannot be found to be discriminatory.[32] Respondent further contends that the purported evidence of animus adduced by the General Counsel is not credible and, moreover, is not sufficient to demonstrate animus toward Porzio and Goncalves for their protected conduct. In addition, Respondent maintains that it had historically been opposed to the creation of the lead operator position, and its proposal to eliminate it was in furtherance of that stated position. Respondent further argues that the General Counsel's failure to join the Employer as a respondent and to prove that the Employer violated the Act is fatal to its case. Finally, Respondent contends that even assuming I were to find that there had been unlawful conduct on the part of the Union, such discrimination was cured by a request made on March 10, 2011 that the Employer restore the jot titles and wage rates of Goncalves and Porzio as they existed prior to the implementation of the 2010 agreement and that, accordingly, no further remedy is warranted herein.[33]

B. Section 8(b)(2) Allegations

Section 8(b)(2) of the Act states, in relevant part, that "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause . . . an employer to discriminate against an employee in violation of subsection (a)(3)." Section 8(a)(3) provides, in pertinent part, that "[i]t shall be an unfair labor practice for an employer . . .by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

As the statutory language suggests, to find a violation of section 8(b)(2) it is necessary to prove not only that a union "cause[d] or attempt[ed] to cause" an employer to discriminate, but further, that the employer discrimination sought or caused was the kind cognizable under Section 8(a)(3). *NLRB v. Stage Employees IATSE Local 776,* 303 F.2d 513, 519 (9th Cir.) (citing *Radio Officers v*. NLRB, 347 U.S. 17, 53 (1954), cert. denied 371 U.S. 826 (1962)).

The Board has stated that to establish an "attempt to cause" violation there must be some evidence of union conduct. *Wenner Ford Tractor Rentals, Inc*., 315 NLRB 964, 965

[31] At the hearing, I denied both motions. Based upon my consideration of the evidence, briefs and applicable case law I hereby reaffirm my ruling to such effect.

[32] Thus, the Union argues that although Porzio and Goncalves suffered a greater reduction in their wages than did the majority, all the other employees suffered less of a reduction. The Union also argues that Alers was given no special treatment.

[33] In its answer to the complaint the Respondent asserts, as an affirmative defense, that the allegations of the complaint are time-barred by Section 10(b) of the Act. It is well-settled that Section 10(b) is an affirmative defense and the party asserting such a defense bears the burden of proof. See *Leach Corp*., 312 NLRB 990, 991-112 (1993) enfd. 54 F.3d 802 (D.C. Cir. 1995). Here, Respondent failed to present any evidence at the hearing to support this contention, and has raised no such argument in its post hearing brief. Accordingly, it is rejected.

(1994). There is no specific requirement, however, that an 8(b)(2) violation involve coercive efforts to "cause" or "attempt to cause" the employer to discriminate. A request is sufficient, may be direct or indirect, and evidence of it may be circumstantially inferred from the record. *Laborers Local 1184 (Nicholson Radio)*, 332 NLRB 1292, 1296 (2000); *M.W. Kellogg Constr.*, 273 NLRB 1049, 1051 (1984), enf. denied on other grounds 806 F.2d 1435 (9th Cir. 1986); *Avon Roofing & Sheet Metal*, 312 NLRB 499 (1993). Prohibited discrimination under Section 8(b)(2) may take the form of a loss of pay or other adverse employment actions, as well as discharge. See *Maui Surf Hotel*, 235 NLRB 947 (1978); *In re Graphic Communications Intern. Union, Local 1-M*, *(Bang Printing, Inc.)*, 337 NLRB 662, 678 (2002)(violation of Section 8(b)(2) encompasses "every practice, act, source or institution which is in fact used to encourage or discourage union membership by discrimination in regard to hire or tenure, term or condition of employment" (quoting *Teamsters Local 357 v. NLRB*, 365, U.S. 667, 676 (1961)).

In determining whether the employer discrimination the union caused or attempted to cause is discrimination condemned by section 8(a)(3), "it is the 'true purpose' or 'real motive' that constitutes the test." *Teamsters Local 357 v. NLRB*, supra at 675. Where a union has acted to interfere with an employee's employment, the Board presumes an illegal motive that may be rebutted "by evidence of a compelling and overriding character showing that the conduct complained of was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or to other matters with which the Act is concerned." Id.

Because motive is at issue in determining whether a union has violated Section 8(b)(2) of the Act, various administrative law judges, with Board approval, have utilized the burden-allocation approach outlined in *Wright Line*,[34] most frequently found in cases which involve allegations arising out of Section 8(a)(3) of the Act. See *Town and Country Supermarkets*, 340 NLRB 1410, 1411 and fn. 7 (2004); *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997); *Teamster Local 657 (Texia Productions),* 342 NLRB 637, 637 fn. 1 (2004)(*Wright Line* applied to allegations under Section 8(b)(1)(A) and 8(b)(2)). See also *Ironworkers Local 340 (Consumers Energy Company)*, 347 NLRB 578, 579 (2006) (applying *Wright Line* analysis to allegations arising under Section 8(b)(1)(A)). Pursuant to that test the Board requires that the General Counsel establish, by a preponderance of the evidence, a prima facie case that an unlawful motive was a substantial or motivating factor in the challenged action.

The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, respondent's knowledge of that activity, and animus toward the employee's protected conduct, *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Inferences of animus or discriminatory motivation may be warranted and may be drawn from circumstantial evidence and the record as a whole. See *Flour Daniel, Inc*. 304 NLRB 970 (1991); *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007)(unlawful motive demonstrated not only by direct, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action).

Once the General Counsel establishes its prima facie case, the burden of persuasion then shifts to the respondent to prove that it would have taken the same action even if the employee had not engaged in protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1980); *Ironworkers Local 340*, supra. At this time, a respondent does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a

[34] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995); *Manno Electric, Inc*., supra at 280, fn. 12.

Here, there is no dispute that, by crossing the picket line during the 2008 lockout, both Goncalves and Porzio, in addition to several other employees, engaged in protected conduct. The protections provided by Section 7 extend not only to a member's decision to participate in union activities, but also to a member's decision to refrain from union activities, including union-sponsored picketing. See *Service Employees District 1199 (Staten Island University Hospital*), 339 NLRB 1059, 1060-1061 (2003); *District 65, Distributive Workers (Blume Associates, Inc.,)*, 214 NLRB 1059 (1974); see also *Service Employees Local 87 (Able Building Maintenace Co.)*, 349 NLRB 408, 411 (2007) ("An essential element of any violation of Section 8(b)(1) is restraint or coercion in the exercise of a Section 7 right; i.e., the right to form, join, or assist a labor organization, or to refrain from such activity.") [35]

Moreover, it is not disputed that the Union was fully aware of both Goncalves' and Porzio's protected conduct.

The question of animus (or unlawful motivation) requires me initially to make certain credibility findings regarding the varying testimony of witnesses regarding events which occurred (1) at or near the picket line in the summer of 2008; (2) in telephone conversations between Goncalves and Krand in June 2010 and (3) during the Union's June 28 meeting with employees.

While it is not unusual for an administrative law judge to credit some but not all of any particular witnesses' testimony, here I found that several witnesses were at times credible and at others not particularly so. Moreover, though I may have credited one version of events over another, that does not necessarily resolve the issue of whether the account offered by the credited witness is sufficient to show unlawful motivation or, alternatively, a defense to such allegations. Thus the relative strength of the credited evidence is another matter to consider.

As a general proposition, there are certain principles regarding the assessment of credibility which should be placed in focus. In particular, it is the case that while uncontradicted testimony need not be automatically accepted, the absence of any rebuttal to specific testimony is a significant factor to consider. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation." *Missouri Portland Cement Co v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). In addition, it has been held that general denials will not ordinarily suffice to refute specific and detailed testimony from an opposing side's witness. See e.g. *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987); *Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981). In a similar vein, a professed lack of recollection does not suffice as a rebuttal to detailed and specific testimony. *Indian Hills Care Center*, 321 NLRB 144, 150 (1996). See also *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials and comparative vagueness is generally insufficient to rebut more detailed testimony); *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001) enfd. 309

[35] Other instances of protected conduct adduced in this record included Porzio's filing unfair labor practice charges with the Board and his criticism of the Union's practices during the negotiation of the 2010 agreement. See generally *Painters Local 558 (Forman Ford)*, 279 NLRB 150 (1986). Although the General Counsel has not specifically alleged that any other instances of protected conduct led to Respondent's discrimination against Porzio, I consider these matters as background evidence in evaluating the allegations raised by the General Counsel herein.

F.3d 452 (7th Cir. 2002)("It is settled that general or 'blanket' denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing side's witness.")

Moreover, the Board has further found that when a witness fails to deny or only generally denies without further specificity certain adverse testimony from an opposing witness an adverse inference is warranted. *LSF Transportation, Inc*., 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc*., 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

Bearing these general principles in mind, I make the following credibility resolutions:

1. Statements associated with the 2008 picket line

I find that the evidence supports Porzio's contention that Krand taunted him by calling the inflatable rat "Les". Porzio's testimony was corroborated by Baumann, and although relations between the Employer and the Union do not have the most congenial history, I find no basis in the record to conclude that Baumann would have fabricated such testimony. As to Fisher's assertion that he never heard Krand refer to the rat as "Les", I note that both Krand and Fisher testified that they attended the picket line intermittently and there is no evidence that Fisher was at the picket line at all times when Krand was present, or that he was in the vicinity when these comments were made. Thus, I find Fisher's denials are not convincing with regard to this issue. Accordingly, I discredit Krand's denial that, in Porzio's presence, he referred to the inflatable rat as "Les."

I also generally credit Porzio about the comments made by Krand during the barbeque held during the summer of 2008; however, I also credit Krand's testimony that their exchange was precipitated by Porzio's statement that that employees never got treated like this when they were in the Union. Porzio's testimony that Krand said words to the effect of "enjoy it now" and "don't worry, you'll get yours" or that Porzio would see what would happen was generally corroborated by Baumann who, however, also noted that Krand's comments were in response to a previous discussion. I additionally find it inherently more plausible that Krand uttered remarks of this sort in response to some provocation. In crediting Porzio's account of Krand said to him, I note that while Krand generally denied making any threats to Porzio, testifying that he merely said "enjoy it while it lasts," he did not specifically refute the other statements attributed to him.

I further credit, in the absence of any specific denial by Krand, Porzio's testimony that at some point during the summer of 2008 Krand told Porzio that he should have remained outside with his Union brothers and he would see what would happen when the Union returned to the facility.

I additionally credit Porzio and Goncalves' testimony that they were called "scabs" by members of the picket line, including chief shop steward Alers, as I find in inherently plausible that this would have occurred.[36] In light of any specific denial from Krand, I additionally credit

[36] I disagree with the General Counsel's contention that the record establishes that Alers was an agent of the Union generally or that any comments made by him can be said to show animus on the part of the Union. As noted above, the General Counsel did not obtain a stipulation regarding Alers' agency status, and there is no admission that he was one during any relevant time. The Board applies common law principles of agency in determining who is an agent under the Act. See *Longshoreman ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir 1009). It is also settled

Continued

Goncalves testimony that Krand told him that he "would see what would happen."

Having made the foregoing credibility resolutions I find that they provide, at best, remote evidence of any specific discriminatory motive. Clearly, the fact that employees crossed the picket line during the lockout was a source of consternation and tension among those employees, their coworkers and Union officials. However, the specific evidence of such instances of hostility adduced in the record, in particular the ad hominem attacks on Porzio and Goncalves, are relatively few and far between given the relative length of the controversy.[37] By contrast, Board volumes are replete with examples of far more egregious instances of picket-line hostility than any which have been alleged and proven here. It cannot credibly be said that the instances of name-calling and other comments adduced by the General Counsel evince overwhelming hostility or carried with them any overt threat. It is apparent that at the time any alleged statements were made, some two years prior to the alleged unfair labor practices, Union officials were clearly not in any position to know how the stalemate would end or whether they would eventually be empowered to take retaliatory action against those who had crossed the line. Further, the inchoate comments described here are not the sort of specific threat of discriminatory action which the Board has found to be coercive. See e.g. *Hotel Employees Union Local 466 (Treadway Inn at Rochester)*, 191 NLRB 528 (1971) (union violated Act where agent told employee who refused to join the picket line that he would soon be "making beds" where housekeepers earned less than wage rate currently paid to that employee).[38] Thus, I consider this evidence to be less than dispositive regarding the Union's motivation in advancing economic proposals as they relate to Goncalves and Porzio individually.

Notwithstanding the foregoing, I find that the record contains other evidence which more convincingly points to an unlawful motive on the part of the Union. In particular, I find that the comments Krand is alleged to have made to Goncalves during their telephone discussions which occurred after the 2010 agreement was implemented evince a discriminatory intent.

2. Goncalves' telephone discussions with Krand

Goncalves testified that, in response to his demands to know why his wages had been cut so much, Krand told him that he would not have done that to him if he had not crossed the picket line. There are certain factors which might, under other circumstances, cast doubt on the

---

that the burden of proving an agency relationship is on the party asserting its existence. *Longshoremen Local 6 (Sunset Line & Twine)*, 79 NLRB 1487, 1507-1508 (1948). Here, the General Counsel has adduced no specific evidence of Alers' agency status either through actual or apparent authority. Further, the evidence in the record, including the timing of Alers' resignation from his shop steward position (April 23, 2010), bargaining notes of the various participants and Porzio's various e-mails to Krand shows that Alers was not involved in contract negotiations at the time the allegedly discriminatory proposals were generated. Moreover, there is no evidence that Alers was in any way otherwise involved in the formulation or discussion of the contract proposals at issue here.

[37] Porzio's general testimony about the other "dozen" times he and Krand exchanged words is insufficient for me to draw any particular conclusion about the nature of these comments. Porzio did not offer any testimony about why he could not be more specific regarding what Krand said to him. Had Krand actually threatened Porzio on these occasions, I find based upon the record as a whole that Porzio would have recalled them with some further measure of detail.

[38] In this regard, I note that the Board has held generally that union agents who engage in name calling of vilification of employees because of their failure to act in conformity with union priorities do not commit an unfair labor practice. *Hotel & Restaurant Employees, Local 466* supra. Moreover, calling someone a scab during the course of protected activity, absent more, is protected conduct. *Nor-Cal Beverage Co*., 330 NLRB 610, 611 (2000).

accuracy and veracity of this testimony but here I find it is generally worthy of credit. As an initial matter, I must note Goncalves' testimony about what Krand said to him is essentially unrebutted. *Missouri Portland Cement Co., v. NLRB*, supra; *Precoat Metals*, supra (and other cases cited above).

I am troubled by the fact that, given the significance of this evidence to its prima facie case, the General Counsel failed to adduce specific evidence to enable me to more fully evaluate to what extent Goncalves is proficient in the idioms or conversational nuances of English (and there is no evidence or reason to suppose that Goncalves' conversations with Krand took place in his native Portuguese). Nevertheless, I infer from the record as a whole that Goncalves generally communicates with his employer, Union representatives and coworkers in English. In this regard I note that Respondent has failed to argue or present any evidence to support a contention that Goncalves was unable to understand what Krand said to him. As noted above, I have found that Goncalves has certain infirmities which compromise his reliability as a witness. Nevertheless, I have concluded that Goncalves did get the gist of what Krand was telling him. His testimony in this regard was unwavering even through a difficult cross-examination and, although Krand was questioned by counsel for Respondent about his discussions with Goncalves, he was not questioned about whether he made the comments attributed to him. Moreover, Krand failed to testify to any non discriminatory reason why such comments had been made, whether they might have been misunderstood or to otherwise provide a framework for such remarks.

As noted above, where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness, an adverse inference is warranted. *Asarco, Inc.*, supra; *LSF Transportation Inc*., supra. I therefore conclude from the record evidence before me that Krand told Goncalves, in essence, that the reason his wages had been cut so drastically was because he had crossed the picket line.

I also find that to the extent Krand offered testimony about his telephone conversations with Goncalves, such testimony lacks credibility in certain significant respects. For example, Krand testified that when the two first spoke on Monday, June 14, he asked Goncalves what he could do for him because he had "no idea" of why Goncalves was calling. Such an assertion strains credulity. Of course, Krand was aware that Goncalves' wages had been reduced by some $5.00 per hour, and that this was prompting his phone calls. Krand continued in this improbable vein when he testified that, after Goncalves asked what happened with the wages, Krand asked him what he was referencing. It is apparent that Krand would have known full well what Goncalves was calling about and did not need to be told what he was "referencing." Thus, I reject Krand's testimony about the nature of his discussions with Goncalves during these telephone calls because, apart from his failure to issue a credible and specific denial about what he told Goncalves about why his wages had been cut, he further embellished his testimony with highly unlikely assertions which tend to undermine his credibility on this issue in its entirety.

3. Inferences of unlawful motivation

In addition to this direct evidence of animus, I draw certain inferences from the record as a whole. *Flour Daniel*, supra; *Real Foods Co.*, supra. In particular, I find that an inference of unlawful motivation is supported by Krand's initial misrepresentation to Porzio that the Employer had sought the elimination of his position. As set forth above, Porzio testified that when he saw his wage cut, he called Krand who initially told him told him that the elimination of his position had been suggested by the Employer. I credit Porzio in this regard and found Krand's explanation – that his initial comments referred to the elimination of the assistant operator position – to be unavailing. Clearly, it would have been apparent to Krand that Porzio was acting

largely in his own self interest and the primary focus of his inquiry would have been about the elimination of his own job (rather than one that was unfilled at the time) combined with the obvious decrease in his wages. Moreover, I further note that Porzio did not amend his unfair labor practice charge to include the allegation that the Union discriminatorily eliminated his position until some time after the June 28 meeting. This tends to support Porzio's testimony that he did not learn that it had been the Union's proposal until that time.[39] Similarly, I credit Goncalves' testimony that Krand initially told him that the elimination of the maintenance 1 position had been negotiated between the parties and that when it was confirmed, at the June 28 meeting, that it had been suggested by the Union he left the meeting in anger.

Here, I find that Krand's deliberate misrepresentation (as in Porzio's case) and his equivocations (to Goncalves) permit an inference of an unlawful motive. In other contexts, the Board and the courts have found that a respondent's failure either to inform employees of its decisions to take action or to describe the real reasons for its actions constitute some evidence of a proscribed motive. See *Real Foods Co*., supra; *Tidewater Construction Corp*., 341 NLRB 456, 457, 458 (2004), citing *Shattuck Denn Mining Corp*. v. NLRB, 362 F.2d 466 (1966)(employer falsely told employees there was no work available rather than that they were locked out; advancement of false reason for action found to constitute evidence of discriminatory motive); *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1439 (7th Cir. 1992)(union's misinformation to an employee and failure to correct that misinformation was held to show bad faith and intentional misconduct).

The General Counsel further argues that the Union's apparent and unexplained deviation from its usual bargaining pattern evinces a discriminatory motive. Here, the evidence establishes that the Union had consistently made, both in 2008 and at the outset in 2010 so-called "across the board" proposals for employees. Beginning in May 2010, the Union thereafter sought increased reductions for the wage rates paid to Porzio and Goncalves, the first of these involving a proposed pay cut of 5 % (as contrasted with the Union's proposal for 3% for other employees). Fisher offered specific testimony regarding this proposal explaining that was predicated on the fact that these employees were earning more than other employees and therefore, could take a "greater hit."

As the General Counsel has shown, at the negotiation session on May 25, in the absence of any counterproposal from the Employer, the Union (again, contrary to its usual practice of responding to such counterproposals) suggested that the wage rates paid to Porzio and Goncalves be further reduced to a total of 10 % during the first year of the contract. Then, on June 1, the Union suggested the elimination of the lead operator and maintenance 1 positions altogether with even deeper cuts for Goncalves and Porzio. This suggestion, however, was in apparent contrast to the Union's stated position, articulated earlier in the bargaining process, that all job descriptions then on file (which at the time obviously included the lead operator and maintenance 1 positions) become effective as of the date of the contract.

Here, the Union has offered scant evidence of the genesis or motivation behind its May 25 or June 1 proposals which deviated from both its established bargaining history and its prior proposal that employees' current job descriptions be memorialized in any new agreement. Fisher did not address the reasons behind the May 25 or June 1 proposals at all, and Krand testified about the June 1 proposal by making vague references to the concessions being sought by management and some percentage formula used, but he failed to identify any specific

[39] Porzio has demonstrated that he has no hesitancy in seeking the Board's assistance to seek redress for wrongs he believes the Union responsible for.

management proposal the Union was responding to or formula used. As is discussed further below, I find this vague testimony to be insufficiently probative as to the Union's motivation. Moreover, it is clear from the record that Atlas did not seek the elimination of the lead operator and maintenance 1 positions; its only proposal in that regard concerned the then-empty assistant operator position.

As a general matter, the Board has held that departures from past practice, devoid of explanation, may be found to be evidence of unlawful motivation. See generally, *Real Foods Co*., supra; *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003)(proof of discriminatory motivation may be inferred from circumstantial evidence based upon the record as a whole including, among other factors, inconsistencies between reason proffered for the challenged action and deviation from past practice). Cf. *Crown Zellerbach Corp*., 266 NLRB 1231 (1983)(discussed infra) (union's bonus payment plan proposal found not to violate the Act where, among other things, it was consistent with prior bargaining history). Here, the evidence of record which shows a substantial deviation from the Union's typical bargaining history, coupled with the Union's failure to address in any detailed way the reasons for its actions, raises questions about Respondent's motives in making the proposals in question.

4. The June 28th meeting with employees

The General Counsel alleges that Krand's comments at the June 28 meeting further demonstrates the Union's discriminatory motivation. In this regard the General Counsel relies largely on Carrasca's testimony that, in response to his inquiry about why positions had been eliminated in the 2010 agreement, Krand replied that the Union had done so for those employees "that were across the street, the ones that were outside. . . and he wasn't representing the ones that were in the plant that crossed the line." I do not credit this aspect of Carrasca's testimony because it is inherently implausible and, moreover, not corroborated and in fact contradicted by other evidence adduced by the General Counsel.

As an initial matter, as set forth above, Carrasca has been found to be "admittedly biased against the Union." He also demonstrated a measure of confusion during his testimony regarding elementary matters such as his job title and accompanying duties. He also admitted that he could recall very little about the meeting. Moreover, I note that Carrasca's testimony about what was stated at the June 28 meeting was uncorroborated by Porzio, who was in attendance and who has been found to be another employee with a similar anti-union bias. In discrediting Carrasca's testimony in this regard, I find that had Krand actually made the sort of comment attributed to him by Carrasca, Porzio, who by that time admittedly had any number of reasons to have a dispute with the Union, would surely have noted any such admissions in his notes and would have testified to them at the instant hearing. I additionally find it unlikely that, whatever the Union's motivation may have been, Krand, an experienced Union agent, would have made that obvious of a comment in front of a roomful of unhappy employees, where all the employees then in attendance had themselves crossed the picket line and where at least one employee was taking notes of what was occurring at the time. In contrast to Carrasca, Porzio's testimony and notes reflect that Krand stated that the lead operator and maintenance 1 positions had been eliminated for the "betterment of the men."

I do, however, credit both Carrasca and Porzio (and accordingly discredit Krand) to the extent that they testified that Krand did make reference to the fact that employees crossed the picket line. Carrasca testified that Krand stated that "if you didn't cross the line, maybe all of this wouldn't have happened." In a similar vein, Porzio's notes indicate that Krand blamed employees for crossing the "lockout line" and in response to Porzio's complaints about how bad the contract was, Krand stated that "we should stayed with our Union Brothers outside."

Similarly, Porzio testified that when he complained about the contract Krand replied that if the union had all stuck together [the employees] would have done better.

I note that the Respondent has argued in its post hearing brief that Krand's statements at the June 28 meeting are more fairly read as a simple statements of fact: that lack of solidarity in the bargaining unit diminished the Union's bargaining power and lead to the need for the Union to make severe concessions during the course of bargaining. I find this to be a fair argument in the abstract: the force of which is undercut by Krand's rather improbable general denial that he mentioned the crossing of the picket line during course of the meeting.[40]

Notwithstanding Krand's lack of believability on this issue, and contrary to the General Counsel, I do not find that any of the credible testimony regarding Krand's comments at the June 28 meeting evince a particular discriminatory intent as to Porzio and Goncalves in particular, but were more generally addressed, as Respondent suggests, to expressions of unhappiness with the fact that the Union had been undermined by the crossovers and that the resulting weakening of the Union's position resulted in the terms of the 2010 agreement.

However, I do find that Krand demonstrated animus toward Porzio's protected conduct when, in the June 28 meeting convened for the express purpose to explain the 2010 agreement, he made a point of reading aloud the unfair labor practice charge Porzio had previously filed against the Union relating to its conduct in bargaining. There was no apparent reason for him to have done so. Neither Krand nor Fisher denied this assertion and it is corroborated by Porzio's notes of the meeting.

5. Summary of conclusions as to the General Counsel's prima facie case

Based upon all of the foregoing I find that the General Counsel has established the elements of a prima facie case of protected conduct, knowledge and animus. In particular, with regard to Porzio, I find that there are several instances of protected conduct; there is remote evidence of animus dating back to statements made by Krand on the picket line in 2008; there is circumstantial evidence of animus based upon Krand's misrepresentations to Porzio about the elimination of the lead operator position under the 2010 agreement and there is direct evidence of animus based upon the reading of the unfair labor practice charges in the June 2010 meeting. Goncalves, on the other hand, engaged in protected conduct no more or no less than other crossovers. While there is some vague evidence of picket line hostility, I do not find this to be particularly availing. However, there is unrebutted and direct evidence of animus which stems from Goncalves' telephone conversations with Krand in June 2010.

I additionally infer animus toward both employees from the circumstantial evidence generally, including the Union's misrepresentations to employees and its largely unexplained abandonment of past practices with regard to its bargaining posture. In addition, and for reasons discussed in further detail below, I have found that certain of the Respondent's defenses are pretextual. As the Board and the courts have found, the proffer of a false, pretextual defense supports an inference of an unlawful motive. *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 3 (2010) (and cases cited therein).

6. The legal implications of Respondent's contact proposals

[40] I also note that Fisher does not corroborate Krand's testimony insofar as he acknowledged that there was some discussion of those inside and those outside.

Thus the elements of protected conduct, knowledge and animus have been set forth by the General Counsel, to varying degrees, with respect to each alleged discriminatee. Under Section 8(b)(2), however, it is also necessary to show that the Union caused or attempted to cause the Employer to discriminate against Goncalves and Porzio in a manner which would violate Section 8(a)(3).

The General Counsel addresses the issue of whether a union may engage in unlawful conduct by virtue of discriminatorily motivated contract proposals by citing to two cases which involved alleged breaches of the duty of fair representation arising under the Railway Labor Act which it deems instructive on the issue: *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524 (7th Cir. 1992) and *Ramey v. District 141*, 378 F.3d 269 (2d Cir. 2004). The General Counsel argues that both of these cases stand for the general proposition that a union's contract proposal which retaliates against employees who cross a picket line is unlawful. [41]

There are also certain Board cases which touch on the issue of whether, by virtue of advancing a contract proposal, a union can be found to have violated the Act. For example, in *Crown Zellerbach Corp*., 266 NLRB 1231 (1983), the Board concluded that a union lawfully agreed to the distribution of bonus payments solely to employees who were actively employed on a certain date, even though the chosen date would diminish payments to other employees who were then on strike in support of a rival union. Although the agreement negatively impacted those employees who did not cross the picket line or remained on a preferential hiring list, a Board majority found that the union's proposals were consistent with past bargaining precedent and made, "out of a good faith belief that the bonus proposal would benefit a significant majority of unit employees." Board Member Jenkins, dissenting, would have found that the union violated Section 8(b)(1)(A) and 8(b)(2) of the Act by proposing and thereafter agreeing to the implementation of what he concluded was a discriminatory bonus payment plan. In addressing its disagreement with the rationale behind Member Jenkins' dissent, however, the Board majority did not quarrel with its basic premise that by proposing (and thereafter agreeing) to the bonus distribution plan, the union could have engaged in discriminatory conduct.

Subsequently, in *Bellsouth Telecommunications, Inc.*, 346 NLRB 637 (2006), the Board accepted the District Court's remand as the law of the case and found that the respondent union

---

[41] In *Rakestraw*, the court decided two companion cases which framed the issue of whether a union's duty of fair representation blocked the union from adjusting seniority in a way known to favor some employees over others. In one of these cases, which involved a strike at United Airlines, the court found that the union did not breach its duty of fair representation by negotiating an agreement which gave pre-strike seniority dates to pilot trainees who had honored the picket line, even though it was found that the union was motivated in part to punish replacement pilots hired during the strike. The court concluded that the union's collective bargaining stance was not a violation of the duty of fair representation because it served he interests of the bargaining unit employees as a whole and did not treat replacement pilots differently from other similarly situated bargaining unit employees. The second case involved the dovetailing of seniority lists between TWA and Ozark Airlines which was contrary to the union's usual practice and operated to the detriment of all but the most senior pilots employed by Ozark, the newer of the two companies. The court held that the union's objective was legitimate in that it sought to avoid protracted intraunion litigation. In each case, the decisive factor was that the union acted to serve the interests of employees as a whole even though some members of minority groups fared less well as a result. By contrast, in *Ramey*, the District Court found a triable issue where the facts established disparate treatment for a rival group and evidence of discrimination. The case then proceeded to trial where a jury found that the union had been motivated by hostility toward the mechanics who had opted not to join a strike. The Second Circuit, on review, found that the jury's conclusion that the union was motivated by hostility toward these mechanics was supported by sufficient evidence.

there violated Section 8(b)(1)(A) and 8(b)(2) of the Act by, among other things, proposing and thereafter agreeing to require employees to wear the union's logo.[42] Apart from the merits of either of these above-cited cases, their relevance to the instant matter is the fact that the Board considered the underlying issue of whether contract proposals could be sufficiently discriminatory as to be in violation of the Act.

Further supporting the conclusion that the advancement of contract proposals may, under appropriate circumstances, be found to be discriminatory is the general proposition, outlined above, that there is no specific requirement that an 8(b)(2) violation involve coercive efforts to "cause" or "attempt to cause" the employer to discriminate. A request is sufficient, may be direct or indirect, and evidence of it may be circumstantially inferred from the record. *Laborers Local 1184 (Nicholson Radio)*, supra; *M.W. Kellogg Constr.*, supra; *Avon Roofing & Sheet Metal*, supra.

Of course, if an employer eliminates a job classification, demotes an employee or alters the wages of an employee due to his or her protected activity, such conduct runs afoul of the Act. Accordingly, based upon the foregoing, I find that if it is established that the Union's contract proposals were discriminatory or retaliatory in nature, this conduct would have either caused or attempted to cause the Employer to discriminate against Goncalves and Porzio in violation of the Act.

Inasmuch as I have found that the General Counsel has made a prima facie case that Goncalves' and Porzio's protected conduct was a motivating factor in the Union's decision to reduce their wages through the elimination of their positions, the burden now shifts to the Respondent to establish, by a preponderance of the evidence, that it would have undertaken the same actions in any event.

3. Respondent's Asserted Defenses as to Motive

In its post hearing brief, the Union has advanced certain arguments about its negotiating stance which, in the abstract, have much appeal. In particular, the Union has argued that in its effort to minimize losses for the bargaining unit as a whole it reasonably offered during negotiations to concede to a reduction in the wages of the top earners as part of its bargaining strategy. Here, however, I find that the evidence adduced in this record fails to meet the Union's burden of proof to establish, by a preponderance of the evidence, a non-discriminatory reason for its actions.

As an initial matter, I find the record fully supports the Union's contention that it was faced with the prospect of giving significant financial concessions to the Employer, and that is charged with reconciling the diverse and contradictory interests of its membership. *Humphrey v. Moore*, 375 U.S. 335, 349-350 (1964). As noted above, the Union has argued that the majority of the employees for whom it was negotiating had crossed the picket line and benefited from its negotiation strategy. Presumably, what the Union means is that if it had not proposed the elimination of the lead operator and maintenance 1 positions, with the accompanying wage reductions, other employees would have suffered increased cutbacks. Respondent thus argues that because its contract proposals favored the majority of those who crossed the line, they

[42] In the underlying case, while the Board recognized that the compelled wearing of the union's logo implicated Section 7 rights to refrain from engaging in activities in support of a labor organization, it found that the Section 7 interest was outweighed by special circumstances underlying the collective bargained uniform policy.

cannot be found to be discriminatory. While this is a factor to consider, it is not necessarily controlling. In other contexts where motivation under *Wright Line* and its progeny is at issue, the Board has consistently found that a failure to retaliate against all who engage in protected conduct does not preclude a finding of unlawful motivation as to others. See *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2001).

Turning to Respondent's proffered explanation for its proposal to eliminate the lead operator job title, I first address Respondent's contention that it was opposed to the creation of this position from the start, and was taking action consistent with that institutional posture. Although the record does show that Respondent never gave its assent to the creation of the position and thereafter filed an unfair labor practice charge, pursued a grievance and an arbitration over the issue and fought the Board's continued deferral of the unfair labor practice charge, there is other evidence to the effect that, at least initially, the Union was complicit in the establishment of the position and led the Employer (and Porzio) to believe that the Union would agree to it. The record establishes that the idea of establishing the lead operator position stemmed from Krand's response to Baumann's suggestion that Porzio be given a managerial job. Porzio's unrebutted testimony was that, at least initially, the Union promised him that it would negotiate an increased salary for the position. Further, as Krand's testimony before the arbitrator revealed, the Union's input was solicited and obtained when Krand presented the Employer with information regarding similar positions which existed in other Union bargaining units. After this feedback was provided, the Employer sent the Union an updated job description which it apparently never addressed. The record further establishes that the Union sought to use bargaining over the creation of this position to jumpstart contract negotiations generally. Thus, it cannot be said that the Union was opposed to the creation of the position at the outset. [43]

Moreover, I note that throughout the history of negotiations up until June 1, the Union never proposed eliminating lead operator position or changing the job responsibilities associated with it. In fact, and to the contrary, in its initial proposal, provided to the Employer on April 1, the Union took the position that the job descriptions then on file (presumably including the extant lead operator and maintenance 1 positions) would become effective on the effective date of the contract. The only substantive explanation that Krand offered for the Union's apparent change of heart and its decision to oppose the establishment of the position stemmed from complaints allegedly received from employees regarding Porzio in 2008. However, these complaints were lodged either prior to or concurrently with bargaining for a successor to the 2003 agreement and there is no evidence to suggest that the Union proposed the elimination of the lead operator position at that time. Moreover, the Union was clearly aware of any such objections by employees well prior to its April 1 proposal that the current job descriptions become effective as of the date of the 2010 agreement.

In this regard, Fisher's testimony that the Union stated its opposition to the establishment of the position in the February 2008 meeting with Atlas management is unavailing. It was not corroborated by Krand, nor by Krand's testimony at the arbitration or by any other witness. Moreover, there is no specific evidence to buttress Fisher's claims that the lead operator position involved managerial duties or entailed the bumping of other employees.

Based upon the foregoing, I find the Union's reliance on its purported institutional

[43] Further, as the General Counsel points out, the Union's charge and grievance was predicated on the failure of the Employer to bargain over the implementation of the position, not the nature of the job itself.

opposition to the creation of the lead operator position to be inadequate to meet its burden of proof to convince, by a preponderance of the evidence, that it's proposal to eliminate the position was motivated by long-term opposition to its creation and implementation and, more importantly, would have been made in the absence of Porzio's protected conduct. To the contrary, I find the Union's reliance upon such stated opposition is not only a post-hoc rationalization, but is, at least to a certain extent, pretextual as well. It is of significance that a pretextual explanation for a respondent's action will support an inference of discriminatory motivation. *Kentucky River Medical Center*, supra, slip op. at 304; See generally, *Laro Maintenance Corp. v. NLRB* , 56 F.3d 224, 230 (D.C. Cir 1995)("when the [respondent] presents a legitimate basis for its actions which the factfinder concludes is pretextual. . .the factfinder may not only properly infer that there is some other motive, but that the motive is one that the [respondent] desires to conceal – an unlawful motive.")(internal quotation omitted). As the Board has found, even something short of mere pretext, for example, the failure to substantiate an asserted rationale for a disputed employment action, coupled with some evidence undermining that rationale, will support a finding of unlawful motivation. *TCB Systems, Inc.*, 355 NLRB No. 162, slip op. at 3 (2010).

Other defenses pointed to in the record include Fisher's testimony that Goncalves and Porzio were better positioned to "take the hit."[44] Even assuming that such a rationale would have offered support to the Union's initial proposals abandoning the practice of across-the-board reductions, the fact remains that neither Krand nor Fisher offered any specific evidence with respect to the origin of or rationale behind Union's proposal to further increase the wage reductions to be absorbed by Goncalves and Porzio by eliminating their positions in their entirety.

As noted above, the only record evidence offered to support the Union's June 1 proposal to eliminate the two positions was Krand's assertion that the Union's decision to use the maintenance 2 rates was because it was the "second of concessions that was requested by management, and it was going back to a – and if I'm not mistaken, there's a percent formula that was developed to develop that number." As to the rates proposed for the boiler operator position Krand similarly stated that the Union "was seeking to address management concessions, and with the percentage being addressed to accommodate what had previously been provided for in the contract." I note that this hearing spanned the course of several days during which much evidence was adduced regarding the exchange of proposals; largely through testimony and documents proffered by the Union. Had Respondent, in fact, tied its proposals to something previously put forward by management or some percentage formula which had been developed by the parties, Respondent certainly had an adequate opportunity to explicate the financial basis for its decisions. It is also noteworthy that Krand offered no independent financial rationale for why, on June 1, the Union proposed the elimination the lead operator position. In sum, such inchoate, ambiguous and incomplete testimony is insufficient to meet the Union's burden of proof to demonstrate a non-discriminatory reason for the proposals made.[45]

---

[44] I note that Baumann testified that Krand reiterated this argument to the Employer during the June 1 meeting; however, Krand offered no testimony about making such comments and therefore did not explain why he might have believed this to be the case.

[45] I additionally note that the record shows that at various times Krand offered differing reasons for the Union's actions from those offered at the hearing. Thus, according to Baumann, Krand stated that the Employer no longer needed the lead operator positions and maintenance 1 positions due to the contraction of the workforce. While it seems that this would more typically be an argument one would expect from an employer rather than from the bargaining representative, offer testimony to such effect, or deny or explain this comment. In a letter provided to the Board's Regional Office, Krand offered yet another rationale for the Union's actions: concern for the continuing viability of the company. Again,

Continued

Moreover, It is a basic tenet of law under *Wright Line* and its progeny that even if one were to assume a dual motive on the part of the Union: i.e. that Respondent harbored a legitimate reason for advancing the contract proposals at issue here, the existence of a lawful motive does not, by itself, prove that the Union would have taken the same action absent Goncalves' and Porzio's protected activity. This is true even if a lawful rationale factored into the Union's decision. As is well-settled, it is not sufficient for a respondent to show it had a lawful reason for making its challenged actions, or that legitimate reason entered into its decision to do so, but that the legitimate reason would have resulted in the same action even in the absence of the employee's union and otherwise protected activities. See e.g. *Turtle Bay Resorts*, 353 NLRB 1242, 1243 (2009); *T. Steele Construction, Inc*., 348 NLRB 1173, 1183 (2006); *Carpenter Technology Corp*., 346 NLRB 766, 773 (2006). Here, I find that the vague testimony offered by the Union's witnesses fails to meet this burden.

Respondent additionally asserts that its proposal was merely that, and it did not coerce the employer to accept it. Respondent additionally points to the fact that its June 1 proposal was rejected by the Employer who then submitted a revised proposal which the Union acceded to. These arguments overlook both salient facts and applicable legal principles. While it is true that the Union's June 1 proposal was not accepted by the Employer, the framework set forth in that proposal, which incorporated the elimination of the lead operator and maintenance 1 positions, was fully presented and agreed to. The only proposed change involved whether employees would receive a wage increase in the contract's third year. Moreover, as has been discussed above, the Act does not require a Union to use coercion in seeking to implement discriminatory proposals or even cause their effectuation. It is sufficient that a Union "attempt" to cause what would be discrimination within the meaning of Section 8(a)(3).

Thus, I find that the General Counsel has met his burden of showing that animus toward Goncalves' and Porzio's protected conduct was a motivating factor in Respondent's decision to propose a reduction in their wages through the elimination of their job titles. In part this showing is buttressed by unsubstantiated claims regarding the Union's supposed opposition to the establishment of the lead operator position. I further find, for all reasons discussed above, that Respondent has failed to carry its burden of showing that it would have made the same contract proposals in the absence of the charging parties' protected conduct. Accordingly, I find that by proposing the elimination of the maintenance 1 and lead operator positions, thereby attempting to cause and causing a reduction in the wages of Goncalves and Porzio, Respondent violated Section 8(b)(2) of the Act.

4. 8(b)(1)(A) Allegations

The General Counsel has additionally alleged that Respondent has violated Section 8(b)(1)(A) of the Act. Under that section, It is an unfair labor practice for a labor organization or its agents "to restrain or coerce [ ] employees in the exercise of the rights guaranteed in Section 7."

For the reasons set forth above I have found that the Union's contract proposals were

---

leaving aside the fact that this is more likely to be a stated concern of the employer, it is yet another, differing rationale for the Union's bargaining posture. As the Board has held, the articulation of such "shifting defenses" is evidence of or, at the least, supports an inference of unlawful motive. See *Taft Broadcasting Co*., 238 NLRB 588, 589 (1978).

discriminatory toward Goncalves and Porzio, in violation of 8(b)(2) of the Act. However, not every 8(b)(2) violation is also a violation of Section 8(b)(1)(A). *Plumbers Local 669 (Lexington Fire)*, 318 NLRB 347, fn. 4 (1995)("It is well established that other 8(b) violations do not give rise to derivative violations of Sec. 8(b)(1)(A)"); *National Maritime Union*, 78 NLRB 971 (1948) enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950).

Here, however, the evidence shows that the Union attempted to cause and did cause discrimination against certain employees due, at least in part, to their protected conduct. The effects of this discrimination necessarily served to "restrain or coerce employees in the exercise of the rights guaranteed in section 7" and the Union's conduct, accordingly, violates Section 8(b)(1)(A) of the Act. See *Radio Officers*, 347 U.S. at 42 (the union by requesting such discrimination, and the employer by submitting to such an illegal request, deprived [the employee] of the right guaranteed by the act to join in or abstain from union activities without thereby affecting his job"); See also *Newspaper & Mail Deliverers (City & Suburban Delivery)*, 332 NLRB 870 fn. 1 (2000) (union violates Section 8(b)(1)(A) of the Act when it discriminates against members in retaliation for their protected activities).

5. The Union's Duty of Fair Representation

Although not specifically set forth in the complaint, the General Counsel has additionally alleged that the Respondent violated the duty of fair representation owed to employees, a claim which falls within the ambit of Section 8(b)(1)(A) of the Act. It is apparent that Respondent was aware that the General Counsel was proceeding on this theory, inasmuch as it was specifically referenced in the General Counsel's opening statement.[46] Moreover, the arguments propounded and cases cited in Respondent's post hearing brief make it clear that the Respondent was on notice that this theory was being litigated here.

A union that is the exclusive representative of bargaining unit employees complies with its duty of fair representation by avoiding arbitrary conduct and serving the interests of all employees in the unit without hostility or discrimination. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). A union, however, is allowed a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Company v. Huffman*, 345 U.S. 330, 338 (1953) (no breach of duty of fair representation by union agreement to contract clause that granted enhanced seniority to one group of employees, thus causing layoffs in another group of employees); see also *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 68 (1991)(breach of duty of fair representation only where union's conduct is so far outside a wide range of reasonableness "as to be irrational").

Thus, a union may lawfully balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations. *Ford Motor Company v. Huffman*, supra at 338. If a union resolves conflicts between employees or groups of employees in a rational, honest and nonarbitrary manner, its conduct may be lawful under Section 8(b)(1)(A) even if certain employees are adversely affected by its decision. See *Humphrey v.*

[46] As counsel for the General Counsel argued: "A union in negotiating contracts can't make everyone happy and often has to make hard choices. In making these choices, however, the union has a fiduciary duty to fairly represent all employees. The Board and the Supreme Court have held that it must uphold this duty by not behaving in a discriminatory , arbitrary or capricious manner." The General Counsel further argued that the evidence would "establish the Union's discriminatory intent [and] a violation of the duty of fair representation and Sections 8(b)(1) and 8(b)(2) of the Act.

Moore, 375 U.S. 335, 348-49 (1964)(no breach of duty of fair representation where union resolved seniority dispute in favor of one group of employees over another).

The standard announced in *Vaca v. Sipes*, supra, applies to contract negotiations. *Air Line Pilots Assn. v. O'Neill*, supra. A union's goals and methodology in reaching these goals "in the light of both the facts and the legal climate that confronted the negotiators at the time the decision was made" is the touchstone in determining whether union conduct that has a disparate impact on one group of employees is unlawfully arbitrary. Id. at 78. "Not every act of disparate treatment is proscribed by Section 8(b)(1)(A) of the act, but only those which, because motivated by hostile, invidious, irrelevant or unfair considerations, may be characterized as arbitrary conduct." *Glass Bottle Blowers Assn. Local 149 (Anchor Hocking Corp.)*, 255 NLRB 715, 719 (1981).

Insofar as I agree with the General Counsel that invidious considerations entered into the Union's advancement of contract proposals regarding the elimination of the lead operator and maintenance 1 positions, I find that, by doing so, the Union violated the duty of fair representation owed to employees.

6. The General Counsel's "failure to join" Atlas does not preclude a remedy against Respondent

At the hearing, and in its post-hearing brief, Respondent has argued that the General Counsel's failure to bring unfair labor charge allegations against Atlas and to include them in this proceeding is fatal to its case.[47] This contention is without merit. Here, there is no question of the Board's authority to proceed solely against the Union:

> We find no support for these arguments in the Act. No such limitation is contained in the language of 8(b)(2). That section makes clear that there are circumstances under which charges against a union for violating the section must be brought without joining a charge against the employer under Section 8(a)(3) for attempts to cause employers to discriminate are proscribed. Thus a literal reading of the section requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate Section 8(a)(3).

Radio Officers Union v. NLRB, 347 U.S. 17, 53 (1954); *Printing Pressman Local 284 (Las Vegas Sun)*, 230 NLRB 1104 (1977) ("Nor do we find merit to Respondent's argument that the Board may not order backpay in this proceeding because the Employer was not charged with a violation of Section 8(a)(3) of the Act. We do not consider such a finding against an employer to be a prerequisite to finding an 8(b)(2) violation nor to fashioning appropriate remedial relief.").[48]

---

[47] As far as the record reveals, and to my knowledge, no charge was filed against the Employer relating to the negotiation of and eventual terms of the 2010 agreement.

[48] The authority relied upon by Respondent in support of this proposition is inapposite, and to the extent it involves issues congruent with those under examination here, fails to support Respondent's contentions. For example, in *Del Costello v. International Brotherhood of Teamsters et al*., 462 U.S. 151 (1983), an employee brought suit against his employer for wrongful termination and against his union for a breach of the duty of fair representation. The issue before the court was what statute of limitations should apply. The court did opine that "[t]o prevail against either the company or the Union. . .[the employee] must not only show that their discharge was contrary to the contract, but must also carry out the burden of demonstrating the beach of duty by the Union." However, the court also specifically noted that "the employee may, if he chooses, sue one defendant and not the other; but the case he must prove

Continued

Accordingly, the Respondent's defense that a failure to "join" Atlas in this matter requires dismissal of the complaint or precludes any appropriate remedy as against the Union is without merit.

Conclusions of Law

1. Respondent United Steel Workers, Local 4-406 is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminatorily proposing the elimination of the lead operator and maintenance 1 positions thereby attempting to cause and causing a reduction in the wages of Goncalves and Porzio because they crossed Respondent's picket line and returned to work during a lockout of employees and for reasons other than the failure to tender the periodic dues and initiation fees uniformly required as a condition of employment, Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

3. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

At the hearing I asked the parties to address the issue of what the appropriate remedy would be for any violations found herein. General Counsel has argued that the remedy in this case should include an affirmative provision requiring the Union to request the Employer to restore the job titles previously held by and to reopen bargaining over the wage rates paid to Goncalves and Porzio and to make them whole for lost earnings and benefits until the Employer takes such action. *Newspaper & Mailer Deliverers' Union of New York (City & Suburban Delivery System)*, supra (Board ordered similar remedy for 8(b)(1)(A) and 8(b)(2) violations where the union caused the employer not to hire certain casual employees in regular permanent positions because employees had crossed the picket line, where no charges had been filed against the employer). The General Counsel contends that should the Employer refuse to reinstate these employees to their former job titles and restore the wage rates that Goncalves and Porzio were earning prior to implementation of the 2010 agreement, the Union should be ordered to make the Goncalves and Porzio whole for their lost wages and benefits until 2015, when the 2010 agreement expires, at which time the Union may negotiate in good faith for the restoration of the charging parties' job classifications and their reinstatement to their former wage rates.

The Respondent argues that even assuming that it were to be found that there was discrimination by the Union, its subsequent actions purged any such wrongdoing. In particular, the Union relies upon certain e-mail exchanges between counsel for the Union and counsel for the Employer as follows:

---

is the same whether he sues one, the other or both." Id at 164-165. Similarly, in *Chauffeurs, Teamsters and Helpers Local 391 v. Terry et al.*, 494 U.S. 558 (1990), a case involving the issue of whether employees had a right to a jury trial in a suit alleging a breach of the duty of fair representation, the Court noted that although the breach of the duty of fair representation and an employer violation of the Act need be proven, the case may involve "both the labor union and the employer, or only one of those entities." Id at 564.

On March 10, 2011, counsel for the Union wrote to the Employer as follows:

> The Union hereby agrees to amend the parties' collective bargaining agreement to restore Les Porzio to his former position as Lead Operator and Manuel Goncalves to his position as Maintenance 1 effective June 1, 2010. This would entail increasing their hourly pay to $26.25 and $24.66 respectively. We would appreciate the company's agreeing to same immediately. [49]
>
> The union is prepared to negotiate a schedule for the payment of the accrued underpayment, and Mike Fisher will be in touch to set a schedule to this effect.

Employer counsel responded as follows:

> Perhaps I am out of the loop on this; however, I am not aware of any such proposal having been presented to Atlas, having been discussed with Atlas, nor there having been a proposal to reopen negotiations of the current collective bargaining agreement between Atlas and the union. I am not aware of any information from the union as to why Atlas should be considering such a proposal.
>
> Please provide me with more information with regard to this email from you so I may discuss it with my client.

In response, Union counsel sent the following email

1. As you are aware, Region 22 of the NLRB alleges that these provisions in the parties' collective bargaining agreement violate the NLRA. Without in any way prejudicing the Union's position that these provisions are not illegal, or that even if they are, the Company is responsible for all or some of the ensuing liability, the Union believes it is prudent to remove the allegedly illegal provisions from the CBA.
2. As a general proposition, the Union is in favor of wage increases for employees.
3. The wage concessions granted the Company by the change in job descriptions were based on the Company's representation that such concessions were vital to the Company's survival. Whatever may have been the case in June 2010, the recent hiring of a new, full-time employee into the bargaining unit makes it clear that the company is no longer in pure survival mode and hence the original rationale for these wage concessions has disappeared.

The record does not reveal any further communications between the parties on these matters.

The Union argues that based upon the foregoing, there is no need to require the Union to pay the charging parties any money, as they relief they seek has already been provided to them by the Union. In support of this contention, the Union cites to several cases including *Tim Foley Plumbing Service*, 332 NLRB 1432, 1433 (2000), *Nudor Corporation*, 281 NLRB 927, 929 fn. 3 (1986) and *Reno's Horseshoe Club, Inc*., 162 NLRB 268, 273-274 (1966). All are

[49] The Union did not clarify for the record how it arrived at these wage rates. I note that the wage rate suggested for the maintenance 1 position comports with the March 2003 wage rate set forth in the 2003 agreement, but there is no explanation as to how Respondent arrived at the rate suggested for the lead operator position.

inapplicable to the circumstances here.[50]

In my view, both the General Counsel and the Respondent have missed the mark.

Addressing Respondent's contentions first, I find that there is no reasonable basis in Board law to conclude that it need not provide a financial remedy to the charging parties. See e.g. *Newspaper & Mail Deliverers*, supra; *Printing Pressman Local 284, supra.* With respect to the relief sought by the General Counsel, I agree that, inasmuch as Goncalves and Porzio were discriminatorily removed from their prior positions an appropriate remedy would include a request that these employees be restored to their prior job titles. However, I additionally find that the General Counsel has overreached in seeking a restoration of Goncalves' and Porzio's wage rates to what they had been prior to the negotiation and implementation of the 2010 agreement. To do so would constitute an improper windfall for these employees.

Based upon the record evidence there is no doubt that, absent any discrimination against Goncalves and Porzio during the negotiation of the 2010 agreement, their resulting wages would have been reduced by some amount, and most probably a substantial one, as was the case for all other bargaining unit employees.[51] While the Board's remedies are generally couched in the terms of restoring the "status quo ante," that term of art generally refers to a restoration of terms and conditions as they did (or would have) existed absent the unlawful conduct. See *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969) (Board remedies are "designed to restore, so far as possible, the status quo that would have been obtained but for the wrongful act").

Therefore, the proper remedy for the unlawful conduct here would more appropriately be framed as the admittedly difficult issue of what the wage reduction would have been for the named discriminatees had the Union not engaged in unlawful discrimination against them. In my view this includes a consideration of the wage reductions suffered by the bargaining unit as a whole, excluding Goncalves and Porzio. Bearing this general framework in mind, I defer consideration of these troublesome issues to the compliance stage of these proceedings. Cf. *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 843-844 (2004) (parties' subsequent collective bargaining agreement would have permitted challenged employment action; thus standard remedy no longer appropriate). [52]

---

[50] For example, in *Tim Foley*, supra the Board found that the respondent committed additional violations of Section 8(a)(1) beyond those which were found by the administrative law judge. It did not supply an additional remedy for these violations as the proper remedy was encompassed in other violations ordered remedied. *Nudor*, a case involving a prior settlement agreement set aside by a regional director for alleged post-settlement violations is inapposite here. In *Reno's Horseshoe Club*, the trial examiner declined to order a remedy for the employer's use of unlawful employment application forms where the respondent had previously stopped using such forms, all such forms were destroyed and there was no evidence that any applicant was affected by the use of such forms. What Respondent apparently has neglected to note, however, was that the Board disagreed with the trial examiner and ordered an appropriate remedy as regards the prior use of the unlawful application forms. 162 NLRB at 269 fn. 1.

[51] It is worth noting that Porzio still earns more than any other unit employee, and Goncalves does not earn less.

[52] For these reasons, as well as the apparent ambiguity surrounding the Union's proposal regarding the wage rate for the lead operator position, I further find that absent some determination by compliance it is not possible to conclude that the Union's e-mail to Atlas constitutes an appropriate remedial request. Accordingly, I shall recommend that they issue another.

Accordingly, having found that the respondent, United Steel Workers, Local 4-406 has violated Section 8(b)(1)(A) and 8(b)(2) of the Act, I shall order that it cease and desist therefrom and from in any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also order the Respondent to take certain affirmative action designed to effectuate the policies of the Act. Having found that Local 4-406 unlawfully caused or attempted to cause Atlas Refinery Inc. to discriminate against Manuel Goncalves and Les Porzio, Respondent shall request that Atlas restore these employees to their former job titles and reopen bargaining over the wage rates to be paid to these employees. Respondent shall also make these employees whole for any loss of earnings suffered as a result of the discrimination against them, in a manner consistent with the foregoing discussion until the parties reach a good faith agreement on the wage rates to be paid to Goncalves and Porzio, or the expiration of the 2010 agreement, whichever occurs first.[53] Backpay shall be computed in accordance with *F.W.Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Further, Respondent shall be required to post or otherwise distribute an appropriate notice, as attached hereto.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[54]

ORDER

The Respondent, United Steel Workers, Local 4-406, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discriminatorily proposing the elimination of the lead operator and maintenance 1 positions thereby causing and attempting to cause Atlas Refinery Inc. to reduce the wages of employees because they crossed Respondent's picket line and returned to work during a lockout of employees and for reasons other than the failure to tender the periodic dues and initiation fees uniformly required as a condition of employment, and

(b) In any like or related manner restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Request that Atlas restore Manuel Goncalves and Les Porzio to the job titles they held prior to the negotiation of the 2010 collective-bargaining agreement between the Union and Atlas request that that Atlas reopen bargaining over the wage rates to be paid to these employees.

(b) Make employees Manuel Goncalves and Les Porzio whole for any loss of earnings

---

[53] In the event the Employer agrees to raise these employees' wages, but does not agree to the amounts deemed appropriate after compliance proceedings, in my view the Union would be liable for any such differential until the expiration of the 2010 agreement.

[54] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and other benefits, less any net interim earnings, plus interest resulting from the discrimination against them, as set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at Respondent's union hall copies of the attached notice marked "Appendix."[55] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by e-mail, posting on an intranet and/or other electronic means, if the Respondent customarily communicates with its members by such means.[56] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Moreover, signed copies of the notice shall be sent to the Regional Director to the Employer for posting at the Employer's place of business, if the Employer elects to do so, at places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 2, 2011

_____
Mindy E. Landow
Administrative Law Judge

[55] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[56] See *Electrical Workers Local 429*, 357 NLRB No. 34, slip op. at 5 and fn. 13 (2011)(citing *J. Picini Flooring*, 356 NLRB No. 9 (2010)).

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discriminatorily propose the elimination of the lead operator and maintenance 1 positions to cause or attempt to cause Atlas Refinery, Inc. to reduce your wages because you cross a Union picket line or for reasons other than your failure to tender the periodic dues and initiation fees uniformly required as a condition of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL request that Atlas Refinery Inc. restore the job titles of Manuel Goncalves and Les Porzio to what they were prior to the negotiation of the 2010 collective-bargaining agreement.

WE WILL request that Atlas reopen bargaining over the wage rates to be paid to Manuel Goncalves and Les Porzio.

WE WILL make Manuel Goncalves and Les Porzio whole for any loss of earnings and other benefits resulting from our discrimination against them, plus interest, until a good faith agreement is reached with Atlas over their wages or the 2010 agreement ends, whichever occurs first.

UNITED STEEL WORKERS, LOCAL 4-406

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.